

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

----- X
:
In the matter of: :
:
COMPULSORY LICENSE FOR MAKING :
:
AND DISTRIBUTING PHONORECORDS; : CRT Docket No. 80-2
:
ROYALTY ADJUSTMENT PROCEEDING :
:
(MECHANICAL) :
:
----- X

2033 K Street, N.W.
Room 538
Washington, D.C.

Thursday, July 17, 1980

The hearing in the above-entitled matter commenced
at 10:10 a.m., pursuant to notice.

BEFORE:

MARY LOU BURG, Chairman
THOMAS C. BRENNAN, Commissioner
DOUGLAS E. COULTER, Commissioner
CLARENCE L. JAMES, JR., Commissioner
FRANCES GARCIA, Commissioner

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

APPEARANCES:

FREDERICK GREENMAN, JR., Attorney-at-Law
Counsel for AGAC

RICHARD M. ZUCKERMAN, Attorney-at-Law
NANCY KILSON, Attorney-at-Law
Counsel for NMPA

JAMES F. FITZPATRICK, Attorney-at-Law
CARY H. SHERMAN, Attorney-at-Law
LOUIS COHEN, Attorney-at-Law
STEPHANIE PHILLIPPS, Attorney-at-Law
Counsel for RIAA

C O N T E N T S

WITNESS: Direct Cross Redirect Recross

FERN CRANSTON

By Ms. Phillipps 9

By Mr. Greenman 122

EXHIBITS:

Identified

RIAA Exhibit U 18

RIAA Exhibit W 79

P R O C E E D I N G S

CHAIRMAN BURG: Good morning. Miss Phillipps, you are going to --

COMMISSIONER BRENNAN: Madam Chairman, I did not pay for this microphone but I'm glad you still recognize me. We have now reached, Mr. Zuckerman, the end of the week. Could I have a status report concerning my request?

MR. ZUCKERMAN: Yes. I can advise you at least in part, if not completely. The NMPA has recognized all along a lot of the problems involved in trying to project an aggregate study of the financial position of music publishers.

We frankly think -- and I state this in all honesty -- that especially in the time left -- and this statement would have been made even if I was making this statement in April or May -- it would be very difficult to compile an aggregate projection of all music publishers of the music publishing industry, so to speak.

COMMISSIONER BRENNAN: Is there any pending request for a survey of all music publishers?

MR. ZUCKERMAN: Well, I don't really understand what the RIAA means by financial statistics of a representative group of music publishers. I don't know how a group of music publishers could be called "representative" unless it was done on a basis of a scientific survey.

What we had hoped to pursue as an alternative was to

1-2 1 approach a number of individual music publishers and see if
2 they would put in their financial data.

3
4 The problem that we have on that is that if you
5 aggregate that data it will probably not be meaningful to the
6 Tribunal because that would depend entirely on how the music
7 publishers were selected. If you do not aggregate that data but,
8 in effect, put in individual profiles of music publishers, then
9 you do get an image of the operations of the specific music
10 publishers and an accurate one.

11 We have been undertaking to contact individual pub-
12 lishers to see if we could do that. We have obtained the consent
13 of some publishers. Other publishers have stated that they would
14 participate in an aggregate survey but they are disinclined to
15 disclose individual data.

16 COMMISSIONER BRENNAN: Does that not perhaps suggest
17 that they share the RIAA concern about the nature of this data?

18 MR. ZUCKERMAN: I think that they share a concern
19 of confidentiality but I think that the concern comes from a
20 different perspective.

21 The NMPA has always taken the position that the
22 profitability of music publishers is not relevant to the pro-
23 ceeding. We did not undertake to conduct a survey. Had we under-
24 taken to conduct a survey, we would have known that the Tri-
25 bunal's rules would have precluded us from making the statement
the Cambridge Research Institute made to the recording companies.

1-3

1 COMMISSIONER BRENNAN: What is your assessment as to
2 when we'll get a report in terms of a date?

3 MR. ZUCKERMAN: I hope, I would hope that by when we
4 reconvene on Tuesday that we will have contacted and gotten a
5 response from a sufficient number of music publishers that we could
6 see whether submitting individual profiles of individual
7 music publishers is a viable method of proceeding.

8 I might also note on that that while the RIAA has
9 suggested that we conduct -- not conduct a survey but provide
10 this information to the Tribunal we would welcome suggestions
11 from the RIAA and also from Cambridge Research Institute, if
12 they have any, on how we could do that. Because I frankly feel
13 that I'm in the position that the RIAA is in default under this
14 Tribunal's order.

15 COMMISSIONER BRENNAN: One of the reasons I'm pressing
16 you is because I'd like to have your report prior to Doctor
17 Kiser's appearance exactly for that reason.

18 MR. ZUCKERMAN: I understand that and in light of that
19 comment I will make sure that we do that.

20 MR. GREENMAN: I do want to make clear one point about
21 our request, our AGAC request --

22 COMMISSIONER BRENNAN: To which I made no reference.

23 MR. GREENMAN: Well, in respect of RIAA there might be
24 some overlap. I'm not asking, we are not asking for the identi-
25 fication of the questionnaires. I don't care whose they are so

1-4

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

long as they come out unaggregated so that we can see the make-up of the individual questionnaires.

Perhaps one CBS would be identifiable by its size but the others, I think, should have their anonymity preserved that way.

MR. FITZPATRICK: Could I comment on that point? Mr. Strauss would take about 17 seconds with the raw data to know exactly which companies are attached to which data. This is not at all like the data underlying the Rinfret study, maybe 27 seconds.

MR. STRAUSS: That's simply not true, Jim.

MR. FITZPATRICK: The representations that we have from our clients are that any problem of confidentiality with large companies and with small companies are not going to be solved simply by X'ing out a number. The size of the company, the character of the business, one with the most fundamental sort of detective work can go backwards from a survey of this sort to determine exactly what the company identity would be, as far as I understand, genesis one in terms of our company's concerns.

If, in fact, one could genuinely have anonymity here, I don't know that I would be to'ing and fro'ing with the other side. We have the most severe concerns that any knowledgeable person on the other side or within the remainder of the industry would promptly be able to determine the genesis, the origin of

1-5

1 these reports even though the formal name might have been
2 stricken.

3
4 So I think that Mr. Greenman's suggestion that some-
5 how striking the names solves the problem at least by our
6 lights is not a satisfactory answer.

7
8 MR. GREENMAN: May I say one thing to that with
9 respect to this talk about other people seeing it. There is no
10 need for anybody other than counsel and consulting experts and
11 the Commissioners to see it and everybody will be under a pledge
12 of confidentiality if the industry wants.

13
14 MR. FITZPATRICK: Well, Mr. Strauss happens to be
15 counsel, an advocate here, an advisor to the other side engaged
16 in what he describes are day-to-day negotiations over audits.

17
18 Mr. Zuckerman's firm represents one large record
19 company and one large publisher. There are serious problems in
20 terms of knowledge absorbed being knowledge preserved. These are
21 very serious problems that some kind of flip assertion of a
22 boy scout oath simply isn't sufficient to solve the problems of
23 confidentiality in a Tribunal where at this point the dimensions
24 of one's power to seal and power to ensure confidentiality I
25 think at best are fuzzy.

26 MR. GREENMAN: Madam Chairman --

27
28 CHAIRMAN BURG: I'm not aware that I asked for oral
29 argument this morning but one brief statement.

30 MR. GREENMAN: It's not a boy scout oath. I'm a member

1-6

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

of the Bar, I think we all are. We have all kept data confidential. Paul Weiss is indeed counsel for WCI and I haven't heard anybody suggest that their representation of the publishers here, for instance, is reason to create such a conflict that they can't keep things confidential even within their own firm.

I haven't heard any motion that they be barred from that representation. I think we can all be trusted to live up to our oaths.

MR. ZUCKERMAN: Madam Chairman --

CHAIRMAN BURG: No, let's -- I think we've had enough on that this morning. We have a witness on the stand and with all due respect, Mr. Zuckerman, I would like to get on with the proceeding.

Will the witness stand, please, to be sworn?
Whereupon,

FERN CRANSTON

was called as a witness, and after being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. PHILLIPPS:

Q. Would you state your name and address for the record, please?

A. Yes. Fern Cranston, 2212 Hollyridge Drive, Los Angeles, California.

Q. Ms. Cranston, what is your occupation?

Accurate Reporting Co., Inc.

(202) 726-3801

1-7

1 A. I am the Director of Royalties and Licensing at War-
2 ner Brothers Records.

3 Q. How long have you held that position?

4 A. In that precise position I have been for about 15.
5 years. Prior to that, I was secretary-assistant to Murray Git-
6 lin for two years which makes my total time at Warner Brothers
7 about 17 years.

8 Q. What is Murray Gitlin's position?

9 A. He is now the senior financial officer. At that time
10 he was the controller of the company.

11 Q. Could you describe your responsibility as director
12 of Royalties and Licensing at Warner Records?

13 A. I'm actually responsible for the administering' and
14 payment of all artists and copyright royalties.

15 Q. When you say "copyright royalties," what type of
16 royalties are you referring to?

17 A. Publisher payments.

18 Q. Can you tell us how many employees report to you in
19 the allocation of responsibilities among those employees?

20 A. Yes. I have a total of 16 individuals. First, we
21 would have the assistant-director of Royalties who works
22 directly with me in the responsibilities of supervising the
23 other personnel, two secretaries. Basically the rest of the
24 employees are split into four various departments.

25 I have a department for domestic artist royalties

1-8

1 only with a manager within that department. That's four
2 employees. I have three employees in foreign royalties including
3 the manager, four employees in the publishing department inclu-
4 ding the manager. I have a manager of external audits and a
5 director of systems whose responsibility is to control any system
6 data within the royalty area.

7 Q Ms. Cranston, thus far in this proceeding we have
8 heard a great deal of testimony regarding how the publishers
9 think the licensing process works and how they would like to see
10 the licensing process work.

11 As a person who is involved in licensing on a day-to-
12 day basis, can you tell us how the licensing process for tunes
13 actually works, please?

14 A Yes. As I just described, I have four individuals
15 within that particular area, one of which is an administrative
16 supervisor and three clerks.

17 Actually, the procedure is quite routine. The infor-
18 mation is received by them from the label copy department of the
19 company on a form also known as label copy which indicates the
20 tune titles, the playing time, the copyright owner, and the
21 writer information.

22 They then determine whether or not the compositions
23 involved would be covered by a Fox license or a non-Fox license
24 or whether they would be subject to any controlled composition
25 clauses.

1-9

1 They would then request on a tune-by-tune basis the
2 license on pre-recorded forms that would be -- well, if it's a
3 Fox license it would be requested on a Fox form. If it's an
4 independent publisher we would have a form prepared by Warner
5 Brothers that would go out to the independent publishers.

6 And if there isn't an area where you are requesting
7 a special rate, per se, the turn-around time for the license
8 would usually be about two to four weeks from the Fox Agency and
9 perhaps a little longer than that from some of the independents.

10 Q. When you say a "special rate," what do you mean by
11 that?

12 A. A reduction generally of the statutory or a percent-
13 tage of the statutory rate for special items that have been
14 released.

15 Q. Would you say that the process of requesting and
16 receiving back licenses is a very "mechanical process"?

17 A. Yes, it is very mechanical providing you're not
18 requesting a reduced statutory rate as I just indicated or a re-
19 duced percentage of a statutory rate. If you do have any varia-
20 tions on your request from the normal statutory rate, it has
21 been my experience that we are met with a great deal of resis-
22 tance. And if you ask for less than statutory rate on a first-
23 line composition that has been released, it is really an iron
24 wall.

25 COMMISSIONER GARCIA: Excuse me. How often do you ask

1-10

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

for a reduction in rate?

THE WITNESS: We generally attempt to secure reduction in rate for a specially-priced album product or items such as medleys where there's a usage of more than one composition which would really only constitute timing for one song.

COMMISSIONER GARCIA: Thank you.

MR. SHERMAN: Excuse me. Can the Tribunal hear Ms. Cranston all right?

CHAIRMAN BURG: Yes. Can you?

MR. SHERMAN: Well, the microphone doesn't seem to be working as well as it does for Commissioner Brennan anyway.

BY MS. PHILLIPPS:

Q. Now, Ms. Cranston, you have testified that as long as you don't ask for any reductions in the statutory rate that the turn-around time for a license is two to four weeks. Can you tell us whether there are standard rates in licenses today on tunes and first-line releases?

A. Yes. Actually, the standard rate is the rate that floats with the statutory rate. Whether it's in a Fox license or an independent license or a controlled composition clause, it -- and by the way, by "a controlled composition clause" I am referring to that clause within the framework of an artist contract which specifically provides for the mechanical rate and is generally based on a percentage of a statutory and it increases as a statutory rate increases.

1-11

1
2 Actually, the rates are indicated either on a rate
3 per tune which increases with the statutory rate or the total
4 album rate which increases with the statutory rate which can
5 be -- oh, for example, a ten times statutory rate in the con-
6 tract. Actually, most contracts, in fact, all contracts that
7 have been signed by Warner Brothers in 1979 incorporate the
8 language which ties the mechanical fee into the statutory rate
9 insofar as the songwriter-artist contract is concerned.

10 MR. ZUCKERMAN: Madam Chairman, I didn't realize that
11 that testimony would come in response to that question. That
12 obviously is testimony describing the content of Warner Brothers
13 contracts and therefore since the testimony is already in the
14 record we request that at least one of those contracts be pro-
15 duced and that they be submitted by some proof, either by affi-
16 davit or testimony that the other contracts follow the same
17 format.

18 BY MS. PHILLIPPS:

19 Q. Ms. Cranston, are you --

20 CHAIRMAN BURG: Excuse me. Is that agreeable?

21 MS. PHILLIPPS: I just wanted to ask Ms. Cranston one
22 question and then I would like to respond to Mr. Zuckerman's
23 suggestion.

24 CHAIRMAN BURG: All right. Let's proceed.

25 BY MS. PHILLIPPS:

Q. Ms. Cranston, are you testifying about these contracts

1-12

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

on the basis of your personal knowledge of these contracts?

A. Yes, I am.

MR. ZUCKERMAN: My request stands.

MS. PHILLIPPS: Well, Mr. Zuckerman, the witness, Ms. Cranston, is under oath and she is testifying based on her personal knowledge and I really see no purpose in your request for an affidavit because we have the witness right here. She is testifying based on personal knowledge. You will have the opportunity to cross examine Ms. Cranston. So your request really serves no purpose at this point in time.

MR. ZUCKERMAN: I now no longer need the affidavit but I do need a copy of the contract and actually since Ms. Cranston carefully specified that she was talking only about 1979, I think that we should have either the same representation about other recent years and we also need copies of representative contracts. The same question arose with Mr. McCracken.

MS. PHILLIPPS: Mr. Zuckerman, you have the opportunity to cross examine Ms. Cranston and ask her questions during your examination. And I believe that a different question arose in connection with Mr. McCracken's testimony because he had not looked at artist contracts and was not basing his testimony on personal knowledge so that created a wholly different situation that is different from the one we have here.

MR. SHERMAN: If I might just add, Madam Chairman, the rules of the game seem to be changing in the middle of our case.

1-13

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

When Mr. Strauss testified he testified about record companies paying four to six million dollars in audit recoveries to the Fox Agency. Did he present any substantiation about it? No. Did we ask for any? No. We trust Mr. Strauss' testimony. He was under oath and we weren't questioning it.

This witness is under oath, too. It was the same kind of thing repeatedly with Mr. Nathan's testimony and everybody else's. All of a sudden, everything that is stated under oath now has to be supported by documents. That wasn't the rule before and I don't see why it should be the rule now, especially when --

MR. GREENMAN: Madam Chairman, may I join this since I think in a sense I started it. Number one, I would join in Mr. Zuckerman's request and my request would be somewhat simpler, simply that there be representative contracts supplied to facilitate cross examination to establish the content of the documents including all the other clauses that may be inter-related and may be added at the end of a contract.

Secondly, with respect to Mr. McCracken's testimony the ruling that was made on that there was no suggestion at that time that Mr. McCracken was not testifying from his own personal knowledge. Had he said that, his testimony certainly would have stood in a very different aspect.

This is something which is being thrown in now and was never on the record before. Finally, the rules of this

1-14

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Tribunal like most agencies do not suggest that an oath alone is sufficient to clarify things and to establish or bring out ambiguities. That's why we have cross examination. That's why when the contents of documents are referred to, it's a standard rule -- in the courts you simply can't do this sort of thing at all. And you have to produce the document itself. But at least even if the rules are relaxed to that extent, if you don't have to put the document in evidence you have to make it available to opposing counsel so they can see what the whole scope of the document is and all the provisions.

CHAIRMAN BURG: Mr. Zuckerman, what we'll do is for the time being allow the testimony in. We'll review it and at some appropriate time if we find that it is lacking to some degree we will strike that testimony at that point.

BY MS. PHILLIPPS:

Q. Ms. Cranston, you testified that the standard rate in licenses, whether they are subject to a controlled composition clause or a Harry Fox license or a license issued by a non-Fox publisher is the statutory rate.

Now, how is that rate expressed in Fox licenses?

A. Well, we have received, as a matter of fact -- do you want an actual example of a Fox license?

Q. No. I was trying to find out how the rate is expressed in a license that you would receive back from Harry Fox that meant to you the statutory rate. In other words, is the rate

END TAPE 1
JW

2-14

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

expressed in cents?

A. Oh, no. They utilize the term "statutory" and indicate specifically on the Fox licenses that it is the statutory rate in effect at the time the record is made and distributed.

Q. Now, you said that the Fox license would indicate that the rate would be the statutory rate that was in effect at the time the license was issued and the rate would change with changes in the statute, in other words, it would float; is that correct?

A. That's correct.

Q. Now, how long have licenses issued by Harry Fox provided that the mechanical royalty rate would float with the rate specified in the statute?

A. Actually, we received a directive from Mr. Al Berman of the Fox Agency in December of 1976 which indicated that the language within the Fox licenses would be changed to conform to the new statutory language.

Q. Do you have a copy of that directive with you?

A. Yes, I do.

MS. PHILLIPPS: I would like to mark a copy of that directive as RIAA Exhibit "U."

(RIAA Exhibit "U" was marked for identification.)

BY MS. PHILLIPPS:

Q. I would like to ask you, Ms. Cranston, where in this letter -- well, first of all can I ask you to identify RIAA

2-2

1 Exhibit "U"?

2 A. Yes. It is a letter to Warner Brothers Records in the
3 licensing department dated December 3, 1976 and signed by
4 Albert Berman.

5 MR. ZUCKERMAN: Ms. Phillipps, do you have a legible
6 copy? I can't read mine.

7 MS. PHILLIPPS: I'm sorry, Mr. Zuckerman. Even in the
8 original that was sent to Warner Brothers there was fading ink.
9 I'm very sorry, disappearing ink.

10 MR. ZUCKERMAN: I guess the Fox Agency doesn't have
11 enough money for a good xerox machine.

12 MR. SHERMAN: No. It just makes it easier to change
13 the terms.

14 BY MS. PHILLIPPS:

15 Q. Can you tell the Tribunal, Ms. Cranston, where in
16 this letter it says that the rate will now float with the
17 statutory rate?

18 A. In the letter itself?

19 Q. Well, in the letter or the attachment.

20 A. All right. In the actual license attached to the
21 letter or a copy of the anticipated wording that would be used
22 on the license, it indicates at about the middle of the para-
23 graph on Page 2 --

24 MR. GREENMAN: Is this the illegible page you're
25 talking about?

2-3

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

THE WITNESS: Yes, this is the fading ink page.

MR. GREENMAN: Can we have the text of this in some legible understandable form?

COMMISSIONER BRENNAN: If somebody would just read it into the record --

THE WITNESS: It actually says -- the entire?

MR. SHERMAN: Yes. Is that possible?

THE WITNESS: "This is to confirm that you may make and distribute parts of instruments to -- I'm sorry. Mine is so illegible at the top I can't read all the wording. "...with respect to the reproduction of mechanical parts." The portion which attributes the language as a floating rate language --

MR. GREENMAN: Could I ask that if counsel's copy is legible that they read it in? But I object to reading in one sentence when we can't see the surrounding contents.

MR. ZUCKERMAN: Madam Chairman, I have a broader objection which may get us beyond the legibility. This is a letter from Mr. Berman which states that he is enclosing a proposed clause to be included in future Fox licenses. That act by itself is meaningless to this proceeding. The question is whether that clause was included in future Fox licenses.

If Ms. Cranston or Ms. Phillipps want to put in any future Fox licenses that include or do not include that clause, that's the direct evidence on the issue.

MS. PHILLIPPS: I believe on the first page of the

2-4
1 exhibit which is legible and the second paragraph it says,
2
3 "We are enclosing herewith a copy of the wording of this clause
4 which will be included on all future agreements forwarded to you
5 covering your recording of compositions controlled by such
6 publishers."

7 This, I think, on its face indicates that this clause
8 will be included on all future licenses and that Mr. Berman con-
9 sidered this notification.

10 MR. ZUCKERMAN: That's my point exactly. He is stating
11 that this will included on future licenses. The question is
12 whether it was included which can be proved by putting in a copy
13 of any of the future licenses.

14 MS. PHILLIPPS: Well, I believe that the statement
15 speaks for itself. It says that it will be included.

16 MR. ZUCKERMAN: I might also note that although I do
17 not have a copy with me, Mr. Berman during his testimony did
18 introduce copies of several actual Harry Fox licenses which are
19 the direct evidence on this issue.

20
21
22
23
24
25
end take 2

1 MS. PHILLIPPS: Madam Chairman, may I suggest
2 that we be allowed to ask Miss Cranston whether future licen-
3 ses did contain this clause?

4 MR. ZUCKERMAN: I would object to that question.

5 CHAIRMAN BURG: All right; let me make a ruling
6 on the first objections, Mr. Zuckerman. I am going to sustain
7 the objection on the narrow grounds that I think we ought to
8 have at least a legible copy. Now, if you can produce legible
9 copies sometime later today, or while Miss Cranston is still
10 on the stand, then we will take it up again.

11 And with respect, let me say I garbled that
12 -- our decision before, and I would like to get it straight.
13 For the record, I said it would be appropriate at this time
14 to take it under advisement and if -- if deemed appropriate
15 to strike that evidence from the record.

16 MR. GREENMAN: A clarification. As before, we
17 don't want the names on the --

18 CHAIRMAN BURG: I understand that. I understand
19 that, and I am sure they understand that, by now.

20 BY MS. PHILLIPPS:

21 Q Ms. Cranston, when the mechanical royalty
22 rate changed in 1978 from 2 cents to 2-3/4 cents, did that
23 affect your royalty payments on pre-existing licenses?

24 A Yes. Absolutely. We had to pay 2-3/4 cents
25 on all licenses incorporating the floating statutory rate
language on the pre-existing licenses as well as on all

1 new.

2 Q Now, if the Tribunal were to increase the
3 mechanical royalty rate again, would that decision also
4 affect pre-existing licenses?

5 A Absolutely. Absolutely. The same essential
6 effect, would be there.

7 Q And that is because the statutory rate is
8 automatically linked to changes in the law?

9 A That is correct.

10 Q Now, there has been a lot of discussion in this
11 proceeding about why the predominant rate is statutory
12 or is linked to the statutory rate. Mr. Berman, during
13 his testimony, theorized that the reason for this is
14 because the record companies don't ask any more for reduced
15 rates. According to Mr. Berman --

16 MR. ZUCKERMAN: What page is this?

17 MS. PHILLIPPS: That is the June 10 transcript
18 at Page 101.

19 BY MS. PHILLIPPS:

20 Q And according to Mr. Berman, all record companies
21 need to do is to ask the publishers who, in Mr. Berman's
22 words, are "very cooperative." That is the June 10 trans-
23 cript at page 149. And I would like to ask you now, Ms.
24 Cranston, whether the employees you supervised have had
25 any experience with asking publishers for reduced rates.

1
2 A Yes. As a matter of fact, we have. I happen
3 to have a few examples here that I would like to talk about.
4 The first example that I have has to do with the Steve Martin
5 album, Comedy is Not Pretty, and in that album, Mr. Martin
6 actually sang the words Born To Be Wild, which comprised
7 about four seconds, of actual playing time. We have demand
8 from the publisher to -- requesting us to pay a full statu-
9 tory rate on this amount of four seconds.

10 We obviously have objected to that situation.
11 I don't really know what the resolution is yet. We have
12 not been apprized of a final decision. The second one I
13 would like to discuss happens to be Richard Pryor also
14 in a comedy album, whereby he actually hummed seven
15 seconds of Close Encounters Of A Third Kind. Again we
16 received a request from the box agency for Screen Gems
17 EMI demanding a full statutory rate on seven seconds of
18 this composition.

19 There has been a lot of debate back and forth
20 on this one. It is my understanding that we probably will
21 have to capitulate this one, because the record is a long
22 album.

23 Another one that recently we have attempted to
24 negotiate has to do with a medley in the Stewart Margolin
25 album. It is comprised of actually two compositions called
Brown Eyed Handsome Man and Too Much Monkey Business, for

1 a total timing of 2 minutes and 57 seconds. We have
2 requested a rate of 2-3/4 cents because the timing really
3 only warrants that amount of time. We have received from
4 the box office a letter stating that we will have to pay
5 full statutory for both songs, even though each song is
6 only one minute and 25 seconds.

7 Another one I would like to call to your atten-
8 tion has to do with an album we recently released on
9 Antinio Carlos Jobin. It was a double album with a special
10 pricing of \$10.98. Approximately a month before the release
11 of this album, we attempted to negotiate reduced rates
12 because of the special price.

13 Mr. Jobin's publisher indicated that they would
14 go along with the two-cent rate providing that all the other
15 publishers concurred with this. By the way, there are 20
16 songs on the album, nine of which were outside publishers.
17 We again attempted to get a reduced rate. The publishers
18 had all refused to give us a reduction in rate on the
19 specially priced albums.

20 Q Now, you just told us about your situation,
21 where you have tried to negotiate those publishers, all
22 apparently unsuccessful, one where there was 4 seconds of
23 music, that was -- where the words were spoken, and there
24 was another one involving Richard Pryor where there were
25 seven seconds of music.

1 MR. ZUCKERMAN: Ms. Phillipps, we have heard
2 the testimony.

3 MS. PHILLIPPS: Are you objecting to my question?

4 MR. ZUCKERMAN: I am objecting to the formula-
5 tion of the question.

6 CHAIRMAN BURG: I am going to overrule it. It
7 strikes me that counsel for both sides has summarized
8 testimony.

9 BY MS. PHILLIPPS:

10 Q And two other examples where you have just been
11 successful in negotiating with the publishers. Now can you
12 tell us whether in the past six months, eight months, you
13 had any examples where you have been successful in nego-
14 tiating with publishers for a reduced rate?

15 A To my knowledge, we have not received any
16 reduction in rates from the publishers in the period
17 of the last six months.

18 Q Well, can you tell us whether the situations,
19 the four situations that I have just summarized, that you
20 just talked about in your testimony, are typical?

21 A Yes, in my experience. Certainly, it is. We
22 attempted to get a reduced rate in this instance, because
23 we felt it was unfair to have to pay a full rate
24 and they they did have it reduced.

25 Q Now, Warner has recently reduced certain items

1
2 in its catalog to \$5.98 list price. Did you try to get
3 reduced mechanical rates on the tunes on those \$5.98
4 albums?

5 A You are referring, I believe, to the catalog
6 that was just released in the second and third week in
7 June, which is the \$5.98 catalog line, which we have
8 not contacted the publishers on as yet, the primary
9 reason being that the release of the \$5.98 program line
10 was extremely confidential until such time as it hit the
11 streets.

12 I believe that we will go through the motions
13 of requesting a reduced rate on those particular albums.
14 I am not very hopeful of receiving them.

15 Q Now, on the \$5.98 line of albums, did you get
16 reductions from your artists on all of them?

17 A Yes, we did.

18 Q Mr. Nathan, the publisher's economic witness,
19 has assured the tribunal that if it were to adopt a 6
20 per cent mechanical royalty rate in the statute, that
21 there would be bargaining that would take place between
22 the record companies and the publishers and the effective
23 rate would be much less than 6 per cent.

24 Ms. Cranston, will you please comment on that
25 theory of bargaining presented by Mr. Nathan and the
publishers?

1 A Well, my feeling is that it is absolutely
2 untrue. My experience has been that the statutory is the
3 statutory rate. That is the business practice and the
4 publishers adhere to that.

5 Q Now, would you say that a record company is in
6 a good position to negotiate with the publishers over
7 mechanical royalty rates?

8 A Not really. I would have to say they really
9 aren't -- or at least I can only speak for Warner Brothers,
10 because we really aren't in that bargaining position because
11 the licenses are not requested in a long enough period of
12 time prior to the actual release of the album, and it
13 really gives the publishers the upper hand. Many times
14 the album can already be on release at the time the license
15 goes out. And they can afford to be unreasonable in a
16 situation like that.

17 Q Now, why is it that you do not apply for a
18 license until near the time that the album or -- the
19 album is released?

20 A Well, actually there was the period of time
21 when we did. We used to actually request all the licenses
22 on all of the tunes that were recorded by the various
23 artists, whether they were slated for release or not.

24 We requested the license on a master number
25 basis. The publishers actually a time period in -- I

1 believe this was about -- that would be late 60s, refused
2 to issue a license any longer, based on the master number.
3 They insisted on having the actual release number indicated
4 on the license where they would sign it. Obviously, I
5 couldn't request the licenses on an early basis based on
6 this, because I couldn't -- I didn't know what the released
7 number was. The released number indicated prices, et cetera,
8 and this is the last thing that is assigned to the album to
9 be released.

10 I might also mention that at the time that we
11 were requesting the licenses on the master number and
12 whether or not they were going to be released, it did in-
13 volve a great amount of paperwork that was in the files that
14 was really never utilized. And we also ran into the problems
15 whereby the publisher having issued us a license on a given
16 tune, automatically assumed it had been released for sale
17 and wanted to know where his royalties were. So I think
18 we spent a great deal of time telling him we had not
19 actually produced the album and there really were no
20 royalties.

21 Q So is it your testimony that you can't even
22 obtain a license until after the record company has invested
23 all its money on production costs of the record and its near
24 release, is that correct?

25 MR. GREENMAN: Objection. Madam Chairman, the

1 testimony was it is not until -- I object to this rephrasing
2 by Counsel in this case because in the first place it is un-
3 necessary in the second place it is isn't the testimony
4 we have had up till this moment. The testimony was they
5 won't do it until they get a release number, whatever
6 that is. I don't see -- if there is something else to be
7 added, I don't see why the witness didn't add it.

8 CHAIRMAN BURG: I will sustain the objection.

9 BY MS. PHILLIPPS:

10 Q Ms. Cranston, if I understand your testimony,
11 correctly, are you saying that bargaining with the publishers
12 did not occur under a 6 per cent rate if the Tribunal were to
13 adopt that?

14 A Excuse me, would you repeat that?

15 Q Am I correct in my understanding of your
16 testimony that bargaining will not occur under a 6 per cent
17 rate if the Tribunal were to adopt that?

18 A Yes, that is correct.

19 Q Now, can you tell me whether the publishers have
20 always been so difficult to negotiate with?

21 A No, not really. There was a period again back
22 in the 60s where you could negotiate with publishers and get
23 a reduced rate from them. Primarily I paid insofar as my
24 own experience is concerned, it was because back in those
25 days you didn't have the dominance of the singer-songwriter,

1 the publishers had more tunes on the albums, and it was not
2 infrequent for more than one publisher to have the majority
3 of the tunes included within a given release. And based on
4 that, they were more willing to give you a reduced rate by
5 usage of the multiple songs that the publisher owned
6 the copyrights on.

7 Q Now, I would like to return for a moment to
8 those four situations where you describe you have been trying
9 to negotiate for a reduction. Can you tell us how long you
10 have been trying to negotiate on those tunes?

11 A Yes, actually the first one that I stated with
12 respect to Steve Martin goes back to November of 1979. The
13 Richard Pryor Close Encounters of a Third Kind began in
14 February of 1980. The Stewart Margolin medley was as of
15 June 1980.

16 CHAIRMAN BURG: I'm sorry, can't be of June.

17 THE WITNESS: Oh.
18
19
20
21
22
23
24
25

1 THE WITNESS: The Antonio Carlos Jobin
2 was in March.

3 MR. JAMES: When did you release the records?

4 THE WITNESS: Pardon me?

5 MR. JAMES: When did you release the records?
6 You have talked about negotiation. When were the records --

7 THE WITNESS: The actual Jobin album was released
8 in April of this year.

9 MR. JAMES: And the others?

10 THE WITNESS: Let me refer to my folder. I
11 don't have the actual release dates with respect to Steve
12 Martin. I believe it was released in conjunction with Fall
13 programming in 1979, which was about September or October.

14 Richard Pryor. I'm sorry, I don't have a date
15 on that either. The Stewart Margolin is a June release.
16 Last week of June.

17 MR. JAMES: Do you generally apply for the
18 reduced rate simultaneously with the release of the record?

19 THE WITNESS: We --

20 MR. JAMES: Or is there a lag there?

21 THE WITNESS: We -- actually, with respect to
22 applying for reduced rates on regular releases, the requested
23 rates would normally go out anywhere from 2 weeks to a month
24 prior to the release.

25 MR. JAMES: Thank you.

1 BY MS. PHILLIPPS:

2 Q Now, Ms. Cranston, your experience with trying
3 to negotiate on just these few albums seems to be at odds
4 with Mr. Berman's testimony that it would be "No big deal"
5 for Fox to handle negotiations on 150 licenses per day.

6 When asked how long the negotiations process
7 will take, Mr. Berman stated, and I am quoting from the
8 June 10 transcript, pages 142-143, and I am quoting now
9 from Mr. Berman's testimony.

10 "Well, I hate to say this in a postal rate
11 building, but depending on the mail, it doesn't take long
12 It takes -- certainly it shouldn't take any more than five
13 or six days. It just depends on where the publisher is
14 located; in a number of cases, we will have telephone
15 communication with the publisher. If he is in New York,
16 we will call up and say 'XYZ is requesting this rate, et cetera
17 et cetera,' and he will say yes or no, and that will be it.
18 Sometimes we will send out the written request, whichever
19 seems more efficient. You can never," I skipped some
20 lines then.

21 He goes on to say, "You can never estimate
22 how long a situation will last. But it is no onerous job
23 as far as we are concerned."

24 Ms. Cranston, would you comment on Mr.
25 Berman's testimony regarding the administrative feasibility

1 of negotiation?

2 A Well, actually, in my opinion, it would be
3 absolute chaos to try and negotiate on a tune-by-tune
4 basis, all of the new product to be released. It
5 administratively would be extremely burdensome and I
6 think that the turnaround time with respect to the
7 licenses would just increase the burden within the
8 Department as well as probably the Fox office or any of
9 the individual publishers. I would also have to say that
10 as a result of ongoing negotiations it would eventually
11 result in a delay to the actual publishers of the monies
12 due for sales on any of the given albums.

13 If we -- on my experience, I would have to
14 say that we would still be negotiating 1979 licenses or
15 even maybe 1978 licenses on that basis for -- requesting
16 for special rates. I would like to say, however, that
17 I will -- I would like to complement Mr. Berman and the
18 Fox office with respect to the normal licensing procedures
19 because they have done a very good job in the last year
20 or two as compared to what it used to be.

21 But that is -- I am specifically referring
22 now to licenses for which you have not requested a reduced
23 rate.

24 Q So there was no bargaining in those situations
25 of course.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

A No.

Q Now, would it be administratively feasible to enter into negotiations on tunes where the artist contract or the singer-songwriter would float with the statutory rate?

A No, your rate would already be negotiated.

Q And that is at the time the contract was entered into?

A Exactly.

Q So with Mr. Nathan's assertions that the impact of the 6 per cent royalty rate would be lessened by bargaining is in your view incorrect?

A That is absolutely dead wrong.

Q Now, I would like to turn now to a different --
MR. JAMES: Excuse me, just a minute. Do you ever negotiate with the singer-songwriter?

THE WITNESS: The singer-songwriter contracts are negotiated at the time that the artist contract itself is negotiated. I don't negotiate the artist contracts myself.

MR. JAMES: Well, do they ever have a reduced rate on the mechanicals? In any of those contracts?

THE WITNESS: I would say today most of those contracts would indicate that their rate would float with the statutory rate.

BY MS. PHILLIPPS:

Q Now, let's turn to a different subject that was raised during Mr. Berman's testimony, and that is the Harry Fox audits of the record company conducted by Pragler and Fenton.

Can you tell me how often Pragler and Fenton audit Warner Records?

A Oh, approximately every two years, sometimes it gets scratched out. It might be a three-year period.

Q Now, can you tell me the period of time that your last audit covered?

A I believe the last audit was from October 1, 1975 through December of 1977.

Q Has that been settled yet?

A No, we are currently negotiating settlement on that.

Q Now, Mr. Berman testified that there were standard claims that appear in the audit letters and one of these standard claims that Mr. Berman discussed were royalties on so-called "shlock" merchandise.

First, Ms. Cranston, can you tell us what is "shlock" merchandise?

A Actually, "shlock" merchandise is product that is sold to a secondary market. The product generally is the result of deletion from your catalog of normal titles,

excessive returns or overpressings of given albums.

Q Now, Mr. Strauss testified on page 18 of his testimony as follows: "As Mr. Berman testified, to the Fox office, if they can make a record," and "they" refers to the record company, "for 40 cents and sell it for 80 cents, less a few pennies royalty for the Fox office, they," again the record company, "have turned around and made 30 cents for example." That is the end of the quote.

Now, Ms. Cranston, can you tell us when the record company sells merchandise on the secondary market, does the record company make any money?

A No, they don't. It is my experience that the prices received on the secondary market, schlock sales, generally average around 50 cents a unit, which doesn't begin to cover the cost of the manufacture of the record or the jacket.

Q So this --

MR. ZUCKERMAN: Madam Chairman, let me just make the record clear so that Mr. Strauss' testimony is referred to. Mr. Strauss was testifying about so-called manufacturer "to dump", which is a practice that he testified Pragler and Fenton had found in some of its audits, that record companies had in effect made additional pressing of records with the intent of selling them to secondary market. He did not testify that Warner Brothers

1 engaged in this practice.

2 BY MS. PHILLIPPS:

3 Q Ms. Cranston, have you ever heard the phrase
4 "manufacture to dump" that Mr. Zuckerman just referred to?

5 A Probably only from Al Berman.

6 Q Ms. Cranston, has there been a prevailing
7 rate in the industry of which publishers have traditionally
8 been paid on schlock sales?

9 A Yes, 12 per cent of your net proceeds.

10 Q By "net proceeds" --

11 A Of your income. Yes.

12 Q And that is income received by the record
13 companies?

14 A Yes. Yes.

15 Q Now, during cross examination of Mr. Berman,
16 he testified that only 3,000 publishers, I am paraphrasing
17 him, coincidentally at the same time, decided that rather
18 than pay 12 per cent of total receipts, record companies
19 should pay the full rate. Full statutory rate on schlock
20 sale.

21 MR. ZUCKERMAN: May I ask for a vague page
22 reference of that paraphrase?

23 BY MS. PHILLIPPS:

24 Q Well, I believe if you look at Mr. Berman's
25 transcript of page 57, 58, you will get the gist of what I

1 am talking about. Mr. Berman then communicated the feeling
2 of his -- these 3,000 publishers to the record company.

3 Now -- and that is that they should give --
4 that the publishers should give full rate on the shlock
5 sales. Ms. Cranston, do you think it is fair for the
6 publishers to get a full rate --

7 MR. ZUCKERMAN: Madam Chairman, I object
8 to the question unless we are going to have a specific
9 page reference. And a quote of the testimony. I think
10 it is totally inaccurate characterization.

11 BY MS. PHILLIPPS:

12 Q Well, perhaps Ms. Cranston can still answer
13 the question whether she thinks it is fair to --

14 MR. ZUCKERMAN: Well, do you want to with-
15 draw the question and re-phrase the question without the
16 preface, I won't object.

17 MR. SHERMAN: The preface is based on the
18 record; since I conducted the cross examination of Mr.
19 Berman, I will answer, as you often do, so that the record
20 will reflect what it reflects. Certainly there was a lot
21 of question about how Mr. Berman received the instructions
22 to suddenly ask for a full rate and the record is replete
23 with inconsistencies regarding what he was told by his
24 principals, when he was told it, what he told the record
25 companies, when he told them, why -- what the reason was

1 that he was doing this for, he was quoted the Billboard
2 version as it was quoted to the record companies and on
3 testimony. And I think we should just let the record speak
4 for itself and limit the question to the fairness of
5 practice.

6 MR. ZUCKERMAN: I agree.

7 BY MS. PHILLIPPS:

8 Q Can you answer the question, Ms. Cranston?

9 A Well, actually, my opinion is that it would
10 be unfair to pay a royalty fee since the record company is
11 not making a profit and it has only recovered a small portion
12 of its costs.

13 Q Now, are there any situations where the
14 publisher can possibly have gotten paid on mechanical
15 royalties already on shlock sales?

16 A Well, yes. We have paid shlock sales as
17 well. As a matter of fact, they have historically been
18 settled on audits, but effective with the third quarter of
19 1977, Warner Brothers programmed and established the
20 payment of shlock merchandise on their regular quarterly
21 statement to the publishers.

22 We continued this practice through 1978 and
23 '79. We were requested by Mr. Al Berman of the Fox office
24 to discontinue his practice and to resume settlement of the
25 royalties on the shlock sales only at a negotiated audit

1 and we therefore have taken them off of our system as of,
2 I think, January of this year.

3 Q Now, Ms. --

4 MR. COULTER: Is shlock a universal industry
5 expression?

6 THE WITNESS: Yes.

7 BY MS. PHILLIPPS:

8 Q Mr. Berman testified that time after time,
9 I am quoting now, from the transcript at page 58, "that
10 they," and they referring to the record companies, "don't
11 pay for the sale of discontinued product."

12 Mr. Berman went on to testify, and this is
13 at page 60 of his transcript, that "actually the record
14 companies should have, when they sold those records,
15 regardless of whatever the price was, they should have
16 paid the royalties to the publishers in their routine
17 quarterly accounting."

18 Are you saying that at one time you did pay
19 on your routine quarterly accounting?

20 A That is absolutely true.

21 Q Now, why did you stop?

22 A Because Mr. Berman requested it.

23 Q You mean you stopped doing what Mr. Berman
24 said you should be doing because he asked you to stop doing
25 it?

1 A He asked us not to incorporate them on our
2 regular quarterly artist publisher statement.

3 And we have stopped doing it.

4 Q Now, what is the difference between paying
5 on your regularly -- regular quarterly statements and
6 pyaing on shlock sales at the time of the audit settlement?

7 A Well --

8 MR. GREENMAN: I thought we were talking
9 about discontinued records.

10 BY MS. PHILLIPS:

11 Q Well, he was in the context of Mr. Berman's
12 testimony, and was talking about discontinued records as
13 being shlock sales.

14 A Well, actually --

15 MR. JAMES: There is a difference there,
16 though, isn't there?

17 MS. PHILLIPPS: Well, it may be that the
18 record company deletes albums from its catalog and it may
19 sell these discontinued records on the secondary market.
20 That is one type of album or disc that the record companies
21 will sell on the secondary market. As well as the other
22 types that Ms. Cranston mentioned.

23 BY MS. PHILLIPPS:

24 Q Now, I am going to repeat the question, so
25 you can get back your train of thought. What is the

1 difference between paying on a quarterly basis and paying
2 on shlock sales at the time the audit settlement --

3 MR. ZUCKERMAN: I am going to object now,
4 because of the continuation of this line of questioning,
5 unless we have a clarification of prior question, which is
6 whether Mr. Berman objected to paying the full rate as
7 specified in the license on the quarterly payments or
8 whether he objected to Warner Brothers paying only 12 per
9 cent on the net with its quarterly payments.

10 CHAIRMAN BURG: Go ahead.

11 MS. PHILLIPPS: Yes, why don't you let --

12 MR. JAMES: It seemed like a fair question.

13 BY MS. PHILLIPPS:

14 Q Can you explain?

15 A Well, yes. Actually, I think that Mr. Berman
16 cited three reasons in his letters to us. Number one
17 reason was, specifically, that he did not wish to seem to
18 be capitulating to the full -- or to the reduced rates on the
19 shlock merchandise regardless of the fact that it had
20 traditionally been settled in -- on the 12 per cent basis.
21 He also indicated that he couldn't tell what exactly were
22 shlock sales on the statement, because as a result of the
23 going on my statement, the sales were regular sales and
24 allocated by tune by publisher, et cetera. It didn't
25 specifically point out that this was a shlock sale.

1 The third point that Mr. Berman raised
2 specifically dealt with the fact that he did not feel
3 it was fair for the record company to offset any negative
4 balances that they might have on their publisher's state-
5 ment against the sales of the shlock merchandise.

6 In other words, if I had overpaid a pub-
7 lisher, he was taking objection to the fact that I would
8 offset that overpayment against the shlock sale.

9 MR. ZUCKERMAN: So Mr. Berman never objected
10 to Warner Brothers' paying the license rate on the shlock
11 sales, because Warner Brothers never paid much.

12 THE WITNESS: No, he really didn't, as a
13 matter of fact, we said to him, in some of the correspon-
14 dence that we had with him, that we would not hold him to
15 the fact that he had capitulated to a reduced rate. We
16 felt that it was a fair way of allocating the funds that
17 we were paying them on a current basis, and that should
18 he wish to take up the subject of schlock merchandise
19 at the audit period for which those sales would be covered,
20 we would be delighted to discuss it.

21 MR. JAMES: You got your first question
22 on cross examination.

23 (Laughter.)

24 BY MS. PHILLIPPS:

25 Q Back to my question. What is the difference

1 between paying on shlock sales on the routine quarterly
2 accounts and paying at the time of audits?

3 A Well, actually, there is not a great deal
4 of difference, when it would appear on the actual quarterly
5 publisher's statement. It would be defined as to what
6 -- it would be allocated to the proper tune title and to
7 the proper publisher. If you are -- if you were, which
8 we are, going back to settling on the old basis, which
9 is somewhere in the neighborhood of 12 per cent of what
10 the receipts are, that is done in a fashion of nearly
11 12 per cent with one check. There is no division insofar
12 as who the money should go to as far as we are concerned.

13 We don't provide any type of detailed
14 statement, because we don't have one to provide on that
15 basis of settlement.

16 Q Well, so how does the Harry Fox agency know
17 which publishers get the money that he receives at the time
18 of audit settlement?

19 MR. ZUCKERMAN: Objection, unless there is a
20 foundation for this question.

21 BY MS. PHILLIPPS:

22 Q Is there anything in the way of information
23 that you would provide that would enable the Fox agency to
24 know to which publishers the royalties that you pay should
25 be allocated to?

1
2 A At the time that we settle on the basis of
3 a 12 per cent?

4 Q Uh-huh.

5 A No. There is no way that we can provide them
6 with information, because we are not tracking it within the
7 system, on that basis.

8 Q Well, then, how would the publisher know,
9 assuming he gets the money, which songwriters to allocate
10 the money to?

11 A He wouldn't know.

12 Q So it is possible that the songwriter might
13 not get paid at all?

14 A That is correct.

15 MR. ZUCKERMAN: Objection.

16 BY MR. PHILLIPPS:

17 Q Now, I would like to turn to some matters that
18 were left over during the testimony of Mr. Stan Kornan,
19 Warner's Executive Vice President. Mr. Kornan presented
20 some data showing artist royalties, unrecouped advances, and
21 mechanical royalties on the 58 freshmen albums released
22 by Warner Brothers in 1979. And by "Freshmen" I mean
23 first albums of new artist.

24 Commissioner Coulter asked a number of
25 questions regarding the derivation and meaning of the data;
and --

1 MR. ZUCKERMAN: Could I have a page
2 reference on that please?

3 MS. PHILLIPPS: I would have to --

4 MR. ZUCKERMAN: Supply it.

5 MS. PHILLIPPS: Supply it.

6 BY MS. PHILLIPPS:

7 Q Rather than go over all of the questions that
8 the Commissioner Coulter asked, I understand that you --
9 that Ms. Cranston, you have prepared a chart presenting the
10 data in a more understandable format.

11 Let me introduce the chart, and would you
12 explain its contents?

13 A Yes.

14 MR. JAMES: Can you hold on until we get the
15 chart?

16 THE WITNESS: I will.

17 MR. JAMES: Okay.

18 BY MS. PHILLIPPS:

19 Q I believe that is RIAA Exhibit B.

20 MR. ZUCKERMAN: No, it is I. We will use
21 this instead of the one that we were using that we had
22 drawn on the easel.

23 CHAIRMAN BURG: Ms. Phillipps, may I interrupt
24 you temporarily for a brief recess?

25 (Recess.)

1 BY MS. PHILLIPPS:

2 Q I believe we were turning to an examination
3 of RIAA Exhibit I.

4 MR. COULTER: Ms. Phillips, excuse me. Now,
5 this is not the chart that Mr. Kornan presented, is that
6 correct?

7 MS. PHILLIPPS: Well, as I recall, Mr.
8 Kornan was giving numbers, and Mr. Sherman was writing them
9 on the --

10 MR. COULTER: Yes, whatever was written on
11 it. Are these those numbers?

12 MS. PHILLIPPS: Well, these include those
13 numbers as well as some other numbers in response to some
14 of your concerns, and I believe Ms. Cranston will go
15 through each of them and point out what each of them mean.
16 But those numbers are included --

17 MR. COULTER: Like, for instance, the royalties
18 credited to artists was the figure that you wrote down
19 -- Mr. Sherman wrote down and Mr. Kornin gave you?

20 MS. PHILLIPPS: Yes.

21 MR. SHERMAN: It is simply in that format. It
22 said artist royalties. This is a more elaborate explanation
23 of what that number is.

24 MR. COULTER: Yes, okay, thank you.

25 THE WITNESS: Shall I proceed?

1 BY MS. PHILLIPPS:

2 Q Yes.

3 A As you see on the actual chart, the first
4 item entered is "Royalties credited to the artist royalty"
5 in the amount of \$2,297,784.

6 The second item are "Royalties actually paid
7 to the artist," and they are royalties in excess of advances
8 and recording costs.

9 MR. COULTER: And was that figure on the original
10 chart?

11 THE WITNESS: No.

12 MR. SHERMAN: \$840,000?

13 MR. COULTER: Okay.

14 THE WITNESS: That amount is \$840,192. The
15 next item are the advances in recording costs recouped --
16 actually recoeved from the artist royalties, and that is
17 the \$1,457,592.

18 MR. COULTER: Excuse me for interrupting.
19 I just want to -- was that figure on the original chart?

20 THE WITNESS: No.

21 MR. COULTER: I'm trying to refresh my own memory.

22 THE WITNESS: No.

23 MR. COULTER: Okay, all right. Thanks.

24 THE WITNESS: The unrecouped, actual unrecovered
25 advances and recording costs is the \$3,348,973 and total

1 mechanical royalties paid is \$680,724.

2 MR. COULTER: Now, again, is the unrecouped
3 advances in recording costs, was that on the chart?

4 THE WITNESS: Yes.

5 MR. COULTER: It was. And was the \$680 figure,
6 was that --

7 THE WITNESS: Yes, it was.

8 MR. COULTER: Okay. Thank you.

9 THE WITNESS: So if you look at the chart, in
10 this perspective, you see that the actual total recording
11 costs and advances on the 58 albums was actually the
12 \$4,806,565. The actual payments to artists, writers, and
13 publishers, for advances, recording costs, and any royalties
14 generated, is \$4,869,889. And down below you will see that
15 Warner Brothers' net loss to date on that was \$1,537,261.

16 MR. COULTER: Now, are you going to continue
17 some questioning on this?

18 MS. PHILLIPPS: Whatever you would prefer. If
19 you would prefer to pursue some questions --

20 MR. COULTER: Why don't you just go on?

21 MS. PHILLIPPS: Okay.

22 MR. GREENMAN: Does the figure labeled "Warner
23 Brothers' loss" of \$1,537,261, is that derived from any of
24 the figures above, or is that a separate figure?

25 THE WITNESS: No, that is a separate item that I
believe was referred to previously.

Accurate Reporting Co., Inc.

(202) 726-3801

1 BY MS. PHILLIPPS:

2 Q Ms. Cranston, can you tell us what are the
3 components of the figures stated as Warner Brothers' loss?
4 How is that figure derived?

5 A Actually, that is taking into consideration
6 all costs and expenses by Warner Brothers on those 58
7 artists with the exception of overhead costs?

8 MR. COULTER: I am sorry. I hate to interrupt,
9 but I just try to -- that is including all the other
10 costs on the record?

11 THE WITNESS: Yes.

12 MR. COULTER: And so it is not specifically
13 related to the figures here in your exhibit? There are
14 a lot of other costs involved when you reach that figure?

15 THE WITNESS: Oh, yes. Yes, there are additional
16 costs.

17 MR. JAMES: Why is that figure included
18 here, what is the reference. Why --

19 MR. SHERMAN: The loss --

20 MR. JAMES: Without --

21 MR. SHERMAN: Mr. Kornan was testifying essential-
22 ly about the risk suffered by -- the risk faced by recording
23 companies and he used an example of 58 first album releases
24 issued by Warner Brothers in the last year; and there is a
25 separate profit and loss statement on each album.

1 And he simply went thru to show what the
2 artist got, what the composers and publishers got, and what
3 Warner Brothers got on those 58 albums, that is essentially
4 why it is there. To show that Warner Brothers suffered a
5 loss on those 58 albums of \$1,500,000 and that the artist
6 royalties were paid in the amounts stated and that the
7 mechanicals were paid in the amounts indicated.

8 MR. GREENMAN: Madam Chairman, I hate to be a
9 bore about this, but I object to the exhibit and the
10 testimony about the loss unless we have the underlying
11 calculations.

12 MR. JAMES: That is exactly what I was coming
13 from. I agree 100 per cent. It is just sitting there.

14 MR. COULTER: Madam Chairman, without dealing
15 with that question, may I just nevertheless ask some
16 questions?

17 On the figures in your chart here, you have
18 basically there were royalties in excess of recording
19 costs and advances, which are net expense. Of the order
20 of something like \$60,000, is that correct, royalties
21 paid?

22 THE WITNESS: No, it is actaully \$840,000.

23 MR. COULTER: No, but I mean if you balance
24 all the figures out. There is an excess of mechanical
25 royalties or rather artist writer publisher royalties

1 in excess of the total expenses for recording costs,
2 something like \$60,000.

3 THE WITNESS: You are doing the bottom line.

4 MR. COULTER: Yes. Right.

5 THE WITNESS: Yes.

6 MR. COULTER: Is that a fair remark?

7 THE WITNESS: And therefore -- now, Mr. Kornan
8 when he testified, said that these figures were related
9 to the sale of around 2,200,000 units.

10 THE WITNESS: That is correct.

11 MR. COULTER: And he said the wholesale receipts
12 for the record company on those units was about \$9.2
13 million.

14 THE WITNESS: Correct.

15 MR. COULTER: Okay; and you have got recording
16 costs and artist royalties coming in to pay for those things,
17 a sum that is about half that. Is that correct?

18 THE WITNESS: About half of our receipts?

19 MR. COULTER: Yes, about half of \$9,000,000.

20 THE WITNESS: It is about half of the actual
21 gross receipts.

22 MR. COULTER: Is that standard, I mean, is about
23 half of the wholesale price of a record artist royalties?

24 THE WITNESS: Well, it is not just -- not just
25 artist royalties. We are talking about all the advances and

1 the cost of actually producing the matter -- the actual
2 master that would make up the recording costs and advances
3 reflected here.

4 MR. COULTER: Yes, but all those costs are
5 repaid by artist royalties.

6 THE WITNESS: Yes, if the artists are successful.

7 MR. COULTER: Regardless.

8 THE WITNESS: Pardon me?

9 MR. COULTER: Regardless. I mean, they -- those
10 costs are paid to the -- those costs are recovered only
11 through artist royalties.

12 THE WITNESS: That is correct.

13 MR. COULTER: Okay, so they are payable, which
14 means that half the price of these records that you sell
15 on wholesale is artist royalties. According to these
16 figures.

17 THE WITNESS: Well, actually, I think -- let me
18 back up a little bit on the basic concept with respect to the
19 actual figure that was used for the sales. We were -- I
20 believe he was referring to a figure of somewhere around
21 actual distributed of 2.3 million. Is that correct?

22 MR. COULTER: 2.5 million 211 thousand.

23 THE WITNESS: Yes, which generates the net
24 income of the \$9,000,000. If you are using a comparison
25 with respect to the artist royalties, you really should

1 look with respect to the total records distributed by the
2 manufacturers, which would include free goods in this case.

3 MR. COULTER: But would free goods -- we just
4 recently that the free goods have been dropped as a
5 concept, and in any case, they wouldn't be much more than
6 what you get, one free record in a hundred, something like
7 that?

8 THE WITNESS: A few more than that, actually.
9 The current normal policy is that for every 100 shipped,
10 15 are free.

11 MR. COULTER: You get 15.

12 THE WITNESS: That is on albums and on singles,
13 it is about 23 per cent policy.

14 MR. COULTER: Okay, and that policy is still in
15 effect?

16 THE WITNESS: Oh, yes.

17 MR. COULTER: Okay, we heard it had been dropped,
18 bu still, you have jumped, blown that up by 20 per cent.
19 Which would be what, another 400,000 units. Right?

20 THE WITNESS: Yes, you would roughly come
21 to something like 2,977,000 units.

22 MR. COULTER: And sales and so forth would
23 be the --

24 THE WITNESS: Yes, it is fine to make a compari-
25 son now with royalty rates to --

1 MR. COULTER: I thought royalties weren't
2 paid on it, on free goods, I thought that was just on --

3 THE WITNESS: Not artist royalties, publisher
4 royalties are.

5 MR. COULTER: Publisher royalties are not?

6 THE WITNESS: Are.

7 MR. COULTER: Are. Artist royalties --

8 THE WITNESS: Artist royalties are not.
9 Publisher royalties are.

10 MR. COULTER: Artist royalties are not paid on
11 free goods?

12 THE WITNESS: That is correct.

13 MR. COULTER: Then the free goods wouldn't affect
14 that -- the total figures of sales upon which the artist
15 royalties are calculated?

16 THE WITNESS: No, not really.

17 MR. COULTER: So it wouldn't -- if you are
18 still dealing with \$9,000,000 --

19 THE WITNESS: Right.

20 MR. COULTER: And almost \$5,000,000 worth of
21 artist royalties, then my question again is does that -- is
22 that normal, half of the price of a record at wholesale is
23 artist royalties? I don't see how there is any way you can
24 avoid without looking at your figures.

25 THE WITNESS: Actually, it is not pure artist

1 royalties. If you are looking at half a million dollars,
2 you are looking at unrecovered advances of \$3,000,000.

3 MR. COULTER: But advances still come out of --

4 THE WITNESS: But I haven't earned the
5 royalties to offset against it. That is why it is con-
6 sidered an unrecovered advance. Unrecouped advance. At
7 the time I have sales enough generated to provide the
8 royalties, it would be offset against that. At this
9 particular moment in time, this is my loss. I have not
10 recovered \$3,348,000 from the actual artist royalties,
11 because there has not been enough royalty generated.

12 MR. COULTER: Okay, I see.

13 THE WITNESS: To pay it.

14 MR. COULTER: Okay.

15 BY MS. PHILLIPS:

16 Q Does that \$3,000,000 take into consideration
17 that \$1.5 million loan? That is part of that number?

18 A The \$1.5 million? Oh, yes. The \$1.5 million
19 is the bottom line.

20 Q Well, you said it didn't really include overhead.

21 A It is my understanding of this chart.

22 MR. COULTER: Did you prepare this chart?

23 THE WITNESS: Not the original. All I have seen
24 is this that was presented to the Tribunal.

25 MR. SHERMAN: I have become confused as well.

1 Mr. Coulter, which line are you referring to when you
2 had this feeling that half of gross revenues was being paid
3 to artists?

4 MR. COULTER: Well, I was looking -- I think I
5 was incorrect. I think the explanation reveals that I was
6 incorrect, but I was simply looking at the \$4,869,000
7 figure.

8 MR. SHERMAN: The one on the bottom right.

9 MR. COULTER: Right.

10 MR. SHERMAN: And that includes, of course,
11 mechanicals as well?

12 MR. COULTER: Yes, yes. It is my understanding.

13 MR. SHERMAN: The unrecouped advances are
14 included in there as well, and if sales had been greater,
15 then the unrecouped advances would be lower --

16 MR. COULTER: I know, I understand that. I
17 was -- but I still have a problem, and this is the problem
18 that I asked Mr. Kornan. Was that if you get -- he said
19 that the -- about the figures on the new release, and these
20 are new releases, the average artist royalty is about
21 50 cents, around 50 cents, and if you multiply 50
22 cents times \$2 million units, you come up with about \$1
23 million, which is less than the royalties credited to the
24 artist accounts. It doesn't handle anything close to the
25 \$4,000,000 of recording costs and advances, well, that

1 wasn't included in that anyway. It just doesn't calculate.
2 Where am I failing to understand.

3 MS. PHILLIPPS: If I may interject here. I
4 think the confusion arose out of some testimony that was
5 originally given to a Mr. Yetnikov, who had said that
6 artist royalties on CBS albums would range in -- would
7 range 40-50 cents an album, and then -- that is for new
8 releases.

9 And -- now when Mr. Kornan presented his data,
10 we took this first line on the chart, which is \$2.297
11 million, divided it by the 2.211 units, and we came to a
12 figure approximately of a dollar an album for artist
13 royalties. And if we can, why don't we let Ms. Cranston
14 explain why or how Warner Brothers royalties for artists
15 might be in the same range as the royalties that Mr.
16 Yetnikov discussed, which were in the range of 50 cents.

17 MR. COULTER: Explain that they are or aren't?

18 MS. PHILLIPPS: That they are.

19 MR. COULTER: That they are. Well, sure, I
20 could be very --

21 MR. GREENMAN: Before she starts, can I add one
22 clarifying question. When you speak of artists royalties,
23 does that include all producer royalties or not?

24 MS. PHILLIPPS: Why don't we let Ms. Cranston
25 respond and that will become clear.

1 THE WITNESS: Okay, I think I can associate
2 what appears to be a dollar rate more closely with the CBS
3 rate by again taking the total units that were indicated
4 originally and saying that we should really consider all
5 units distributed, insofar as the royalty that is paid
6 off of that. If you compare and gross up for the figures
7 that I was talking about, referring to earlier, you would
8 come up with actual total records distributed about
9 2,977,000 and if you compare that with the total royalties
10 of the 2 million -- 2,977,000, and compare that with the
11 total artist royalty expense of \$2,297,000, you would see
12 something more like 77 cents a record. Now --

13 MR. COULTER: I thought you just said they
14 weren't paid on those.

15 THE WITNESS: I am comparing totally units
16 distributed. The units originally referred to by Mr.
17 Kornan were available units only. Now, if I am to bring --

18 MR. COULTER: I thought the artists --

19 THE WITNESS: They are not.

20 MR. COULTER: Are not paid on those, and therefore
21 how would it relate?

22 THE WITNESS: I am trying to relate it to what
23 I think perhaps Mr. Yetnikoff was talking about when he
24 brought his artist royalties in the neighborhood of 50
25 cents. They base their artist royalties on a wholesale

1 contract, primarily, and they do take into consideration
2 the free goods and the artist royalties do get reduced
3 by the free goods; so we can't compare a full artist royalty
4 on only available sales. You have to say "Okay, they don't
5 get paid on the free goods, therefore, we effectively have
6 to reduce that rate."

7 Now, if you reduce -- if you do this type of
8 a compairson, you are coming in with roughly 77 cents an
9 album, and as a general rule, the producer participation
10 in an artist royalty rate, is somewhere around the ratio
11 of 25-75.

12 MR. COULTER: Well it is 25 --

13 THE WITNESS: Exactly, which would have been
14 your down the artist rate to 58 cents, and I think that is
15 probably where Mr. Yetnikov was coming from.

16 MR. COULTER: You are saying these are sort
17 of internal just accounting relationships. They don't
18 necessarily relate to how the contract is stipulated
19 with the artist, is that correct? I mean, this is the way
20 you calculate to figure out your overall costs?

21 THE WITNESS: No, I was just trying to do a
22 ratio for you here because you looked at the royalties and
23 you throught they were extremely high, compared to what Mr.
24 Yetnikov has said CBS' royalties were. In other words,
25 we're looking at almost what looks like a dollar in

1 comparison to 50 cents, and generally royalties are a
2 little more standard within the industry.

3 MR. COULTER: He said that generally for their
4 contracts it is about 18 per cent of wholesale, that is
5 what the artist royalties get, and that -- and generally
6 the figure used as wholesale is about \$4, that is what
7 I think both Kornan and Mr. Yetnikov said, and that -- 18
8 per cent of \$4 comes out around 50 cents.

9 THE WITNESS: Right.

10 MR. COULTER: So --

11 THE WITNESS: We base our royalties on retail.
12 We don't use the wholesale base with respect to calculating
13 the artist royalty. And I was only attempting to bring
14 down what appeared to be an outrageous royalty rate
15 as compared to a CBS royalty rate in the method of
16 calculating the units and saying that the artist rate
17 also includes the producer fee, which is generally 25
18 per cent. To bring us down to a 58-cent level, which I
19 think is a little more in line with the statement that Mr.
20 Yetnikoff made about 50 cents a record.

21 MR. COULTER: Okay, now the producer fee is
22 for any kind of producer?

23 THE WITNESS: Yes.

24 MR. COULTER: And this is on all these records,
25 there was an independent producer?

1 THE WITNESS: I don't know that there --
2 every one of them, I haven't really looked at them but I
3 would say for the majority of them, there certainly would
4 have.

5 MR. COULTER: Okay, now, I thought the ANR
6 divisions of the record company do their -- a lot of
7 producing. But is that cost figured into the artist
8 royalties?

9 THE WITNESS: Well, the royalties represented on
10 this chart are the total royalties paid, whether they are
11 producer royalty or an artist royalty.

12 MR. COULTER: Would a lot of the producer
13 royalty go into the record company, if they were doing
14 their own producing?

15 THE WITNESS: Well, the producer, an in-house
16 producer would still receive a royalty rate, for producing
17 an artist.

18 MR. COULTER: It doesn't make any difference
19 whether it is in-house --

20 THE WITNESS: No. That is correct.

21 MR. COULTER: Because in-house goes back to the
22 record companies with that? If it is an in house producer,
23 the royalty goes to -- obviously the record company? He is
24 working for the --

25 THE WITNESS: He may be on salary, but he also

1 has a royalty agreement with the company, whereby the
2 company will pay him a producer's royalty on top of his
3 salary.

4 MR. COULTER: Oh, really?

5 THE WITNESS: Yes.

6 MR. COULTER: And he gets a royalty on these
7 records he produces?

8 THE WITNESS: Oh, yes. Yes.

9 MR. COULTER: Is the salary included in the
10 cost of the record or is it pro-rated over --

11 THE WITNESS: No, that's not within these
12 figures.

13 MR. COULTER: Okay, that producer royalty
14 still is paid into the fund for recording costs until
15 they are recovered, is that correct?

16 THE WITNESS: Sometimes yes, sometimes no.
17 It depends on the individual contractor and producer as
18 to whether he is payable from the time the first record
19 is payable or whether he has to recover the costs. He
20 can get paid for the record.

21 MR. COULTER: Is that frequent?

22 THE WITNESS: I can't say it is really in-
23 frequent. There are contracts both ways, within the
24 industry.

25 MR. COULTER: Okay, would an in-house producer,

1 would his royalties generally be used to help pay recording
2 costs?

3 THE WITNESS: Not generally.

4 MR. COULTER: He would get that regardless
5 of day one?

6 THE WITNESS: That is correct.

7 MR. COULTER: So that possibly 25 per cent of
8 the royalty would not be used for the -- help repay
9 recording costs?

10 THE WITNESS: That is correct.

11 MR. COULTER: And that is included in your --
12 and that would be included in the \$2,000,000 figure at the
13 top of the page?

14 THE WITNESS: Yes, well, that would be in that
15 figure, or in any royalties paid to artists. If a producer
16 -- obviously there were two artists that were successful,
17 within this group of 58 who earned royalties, and over and
18 above their actual costs, there could have been producers
19 attached to them, also, who also would have received
20 royalties.

21 MR. COULTER: Would not have --

22 THE WITNESS: Would have.

23 MR. COULTER: But the producer's royalty is
24 -- you said you weren't sure whether it was in that \$2,000,000
25 figure or where else?

1 THE WITNESS: No, if the producer royalties
2 would either appear within the -- credited to the artist
3 royalty accounts, if in fact he does participate in any
4 part of the recording costs, or it would be incorporated
5 within the \$840,000 figure, which is the paid royalty.

6 If he has a type of contract where he is
7 paid without recovery costs.

8 MR. COULTER: Okay. So the royalties in the
9 \$2,000,000 figure, have been used --

10 THE WITNESS: To recover costs.

11 MR. COULTER: To recover costs. And in the
12 \$1,000,000 figure, I thought that they were the ones
13 recovering the costs.

14 THE WITNESS: That is what I actually recovered.
15 From artist royalties. \$1 million -- \$457,000.

16 MR. SHERMAN: That is simply subtracting
17 the \$820,000 --

18 THE WITNESS: Yes.

19 MR. SHERMAN: -- figure from the \$297,000 figure.

20 THE WITNESS: Yes.

21 MR. COULTER: I am still trying to figure out
22 about how much royalty -- Mr. Yetnikov, when he was talking
23 about the 50 cents a record, was not including producer
24 costs, is that what you were saying?

25 THE WITNESS: I don't know whether he was or

1 not. That is the only way I would bring down the Warner
2 Brothers' apparently high rate, to him, assuming that he
3 had extracted it. I really don't know what he meant by the
4 50 cents.

5 I do know that rates are generally not that low
6 within the industry, today.

7 MR. COULTER: Really?

8 THE WITNESS: Yes.

9 MR. COULTER: And the royalties are generally
10 in your -- are generally about 77 per cent?

11 THE WITNESS: About 77 cents a record, which
12 would include the producer's royalty, yes.

13 MR. GREENMAN: You are calculating that on total
14 records distributed, as I understand it, not records
15 sold. Is that right?

16 THE WITNESS: I am utilizing total records
17 distributed as against the actual royalties shown on this
18 particular chart.

19 MR. GREENMAN: To arrive at the 77 --

20 THE WITNESS: Yes.

JW7-1

1 MR. GREENMAN: Madam Chairman, there is an objection
2 pending. And my objection goes really to this figure at the
3 bottom here, this Warner Brothers loss figure, so-called. And
4 again, I would ask that the underlying calculation be made
5 available or that it be stricken because it obviously involves
6 any number of allocations about which one would need to
7 question, one would need to see the figures. We don't know
8 what's in there and what's not in the way of costs.

9 MR. SHERMAN: Madam Chairman, we're in an anomalous
10 situation here. Mr. Cornyn presented an identical figure during
11 his testimony. No objection was made then. There was some
12 questioning from the Tribunal about what kinds of costs were in
13 there. Mr. Cornyn testified about the kind of costs that were in
14 there and he also testified that these figures came directly
15 from the P&L statements for the 58 albums.

16 We have simply provided this chart in an effort to
17 clarify the responses to Mr. Coulter's questions and now we're
18 being told that we should not put information in here which was
19 previously put in without objection and testified to.

20 CHAIRMAN BURG: Objection overruled.

21 BY MS. PHILLIPPS:

22 Q. Ms. Cranston, how many artists received the \$840,192
23 of artist royalties that were paid out?

24 A. Actually, there were two artists who received
25 royalties for that amount.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

7-2

Q. So what about the other 56 artist groups?

A. Their royalties were credited against any and all recording expenses incurred.

Q. So they did not sell enough to --

A. That's correct. They did not recover their costs.

Q. Now, can you tell me who received the mechanicals paid in the amount of \$680,724?

A. Well, that was paid to the publishers. And I would assume in there would be the same two singer-songwriter publishers since they were the two successful ones that were receiving royalties as far as the artist royalties were concerned.

Obviously, any other singer-songwriter would have received royalties because those monies do not recover any of the recording costs as well as any and all publishers involved.

Q. So all the copyright owners shared in this \$680,000 but the bulk of it probably went to the two artists who sold enough albums to receive artist royalties?

A. That's correct.

COMMISSIONER JAMES: Do you have those figures so we can see what the differential is?

MS. PHILLIPPS: The figures on the --

COMMISSIONER JAMES: I'm asking the witness.

THE WITNESS: Figures? I'm sorry.

COMMISSIONER JAMES: You said the two artists who made

7-3

1 money, included in --

2 THE WITNESS: There were two artists involved in the
3 \$840,000 payment of artist royalties. That was only gotten by
4 two artists.

5 COMMISSIONER JAMES: They were included in there?

6 THE WITNESS: Yeah. That money was earned by two
7 artists.

8 COMMISSIONER JAMES: The total.

9 THE WITNESS: The 840,000.

10 COMMISSIONER JAMES: Total?

11 THE WITNESS: Yes.

12 COMMISSIONER COULTER: Were they their own publisher?

13 THE WITNESS: Yes, they are.

14 COMMISSIONER JAMES: Do you know if their contract
15 provided that they would get the statutory mechanical?

16 THE WITNESS: I did not research that.

17 COMMISSIONER JAMES: Can you check that and get that
18 information for us?

19 MS. PHILLIPPS: Yes. We would be glad to.

20 COMMISSIONER JAMES: Over noon? I have some other
21 questions relating to that.

22 MS. PHILLIPPS: We will attempt to find out.

23 BY MS. PHILLIPPS:

24 Q. Now, I would like to turn to --

25

7-4

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

MS. PHILLIPPS: Commissioner Coulter, I am going to switch subjects now. Do you have any further questions?

COMMISSIONER COULTER: No. Please. I'll probably have some --

BY MS. PHILLIPPS:

Q. I would like to turn now to another matter that came up during Mr. Cornyn's testimony. When Mr. Cornyn testified, he demonstrated consumer price sensitivity by comparing sales of Warner Brothers albums at a list price of \$7.98 to those by the same artist at a list price of \$8.98.

On cross examination, Mr. Zuckerman asked specifically about the sales on the Van Halen I and the Van Halen II albums. Have you looked at the sales figures on those two albums?

A. Yes, I have.

Q. What did those figures indicate?

A. The figures on this chart would indicate that through May, sales on the Van Halen I which was priced at \$7.98 were 55 percent higher than the sales of the Van Halen II which was priced at the \$8.98 level.

Q. So Mr. Cornyn was correct when he testified that the \$7.98 product is outselling the \$8.98 product?

A. Yes, by a wide margin.

MR. ZUCKERMAN: Madam Chairman, I would like to request the production of whatever document Ms. Cranston is

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

7-5 JW

referring to so that we could also know what time periods the sales refer to.

COMMISSIONER JAMES: She referred to it as "this chart." I thought we had it.

MS. PHILLIPPS: No.

MR. SHERMAN: Those are the internal Warner Brothers figures that she is referring to compiled for the purpose of checking the accuracy of Mr. Cornyn's statement. And those are confidential unit sales figures that the company will not release, I'm confident.

MR. ZUCKERMAN: Then I move to strike the testimony.

MR. SHERMAN: This is going to be a problem that is going to run through the entire course of this proceeding. We have not raised any objection to any of the unaudited, undocumented and unsubstantiated testimony put in by the publisher witnesses but whenever we try to even substantiate a point and we present information under oath, we are told that we can't present it unless we provide all of the confidential information that supports it.

I just consider that terribly unfair.

CHAIRMAN BURG: I think it's a good time to recess until 1:30.

(The hearing was adjourned for a luncheon recess at 12:01 to reconvene at 1:30 p.m. this same day.)

A F T E R N O O N S E S S I O N

MR. SHERMAN: Madam Chairman, I perhaps may have misunderstood the question when we were adjourning that was on the floor. As I understand it now, the question was raised by Mr. Zuckerman as a request for the release dates and the period covered by the sales on the Van Halen albums and I have that here.

The Van Halen I album was released in February 1978. The Van Halen album was released in March 1979. The sales figures total in which Ms. Cranston said that the sales of the \$7.98 album were 55 percent higher than the \$8.98 album are all sales from the beginning through the end of May 1980.

I can also tell you that at the time that the \$8.98 Van Halen II album was released in March of 1979 that for that month and the next four months, for a total of five months, the \$8.98 album outsold the \$7.98.

Beginning in August of '79 and for the next nine months or for a period of the last ten months, the \$7.98 album outsold the \$8.98 album in every month. I hope that clarifies the record.

MR. ZUCKESMAN: If I might address one more question, Mr. Sherman, I then would withdraw my request for the underlying documentation. And that is that at the time the statement was made in the Warner 1979 annual report that the Van Halen II had sales that were approaching two million copies and the Van Halen

8-2

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

I had sales of lower than that. If Mr. Sherman will confirm that that fact was correct as of that time, then I would have no need for further underlying documentation.

CHAIRMAN BURG: Do you have that information?

MR. SHERMAN: I don't have that information. I can certainly undertake to try to respond to that later.

CHAIRMAN BURG: Is that agreeable? You are withdrawing your objection, Mr. Zuckerman?

MR. ZUCKERMAN: Yes.

MR. GREENMAN: I have a clarifying question because I didn't hear the month or the day that -- the dividing point in your statement --

MR. SHERMAN: The last month that the \$8.98 album outsold the \$7.98 was July '79 and from then on the \$7.98 outsold the \$8.98.

CHAIRMAN BURG: Ms. Phillipps, you may proceed.

MS. PHILLIPPS: This morning Commissioner James asked Ms. Cranston whether the mechanical royalty rate specified in the artist contracts that appeared in the 58 album chart that we had this morning was linked to the statutory rate. And I'm referring to the two artists who did receive artist royalties.

COMMISSIONER JAMES: That \$840,000 figure?

MS. PHILLIPPS: Right, right.

BY MS. PHILLIPPS:

Q. Ms. Cranston, were you able to find an answer to

8-3

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Commissioner James' question?

A. Yes, I was. I called the West Coast on my lunch hour and had my assistant pull the actual contracts and read them to me. And they definitely are statutory linked.

Q. Also during this morning's session, there was some objection raised regarding the letter from Al Berman dated 1976 notifying the record companies that future licenses would contain a mechanical royalty rate that would float with the statutory rate in effect at the time.

And the objection was raised, "Well, do you have any licenses from Harry Fox that contain that precise language or that contain language that would be to that effect that was contained in the letter?"

I understand that you were able to find some Harry Fox licenses. Can you tell us -- first of all, I would like to give the Tribunal copies of the licenses and have Ms. Cranston point out where the relevant language is in these licenses.

MR. SHERMAN: May I say that I am handing to the Tribunal copies of RIAA Exhibit "V" which is the license that you have just been referring to that is dated December 30, 1977.

And I am also providing a copy of RIAA Cross Examination Exhibit 11 which is a license that was previously introduced in the proceeding during the cross examination of Mr. Feist. I believe Mr. Feist and Mr. Berman confirmed that that is the current form of license being issued by the Fox Agency.

8-4

1 BY MS. PHILLIPPS:

2 Q. Ms. Cranston?

3 A. Yes. With respect to the license dated December 30,
4 1977 it indicates in about the middle of the paragraph and it
5 starts in quotes or in parentheses and it says, "(It being
6 understood that the statutory rate shall mean the statutory
7 rate in effect at the time of the manufacturer of such parts
8 and any royalties stated in terms of a percentage of the statu-
9 tory rate shall apply to the statutory rate at such time."

10 The second license which you have been handed indi-
11 cates a statutory rate on the first sheet. The second sheet
12 indicates under numbered paragraph (2), "For such phono records
13 made and distributed, the royalties shall be the statutory
14 rate in effect at the time the phono record is made except as
15 otherwise stated."

16 Q. Ms. Cranston, can you tell me which of these licenses
17 were issued first or issued earlier?

18 A. Actually, the one dated December 30, 1977 is the
19 license that was immediately in effect with the Fox office.

20 Q. At what time?

21 A. It became effective in -- he actually started issuing
22 the licenses in 1977. I'm not sure what you're asking.

23 Q. That's what I'm asking. And the other license, is
24 this the license that is now in effect at this time?

25 A. This is a license currently used by the Fox Agency

8-5

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

which is a bit more streamlined. It looks like they had a new computer system in place.

Q. Thank you. Now, I would like to turn to our final subject for today and that is the specifics of the administration of the six percent proposal submitted by the publishers. As director of Royalties and Licensing for Warner Records, would you be responsible for Warner's implementation of a new royalty payment system?

A. Yes. I would be responsible for the implementation and administration of such a system.

Q. Have you studied the proposed regulations submitted by the publishers in connection with their six percent proposal?

A. Yes, I have.

Q. Can you estimate for the Tribunal what the publishers would cost Warner Records to implement and maintain it?

A. The ongoing maintenance of such a system is a little unknown at this moment. The particular cost involved with just establishing a computer system to handle this specific proposal would be in excess of about \$600,000.

Q. Is this just for Warner?

A. Just Warner Brothers.

Q. So it's not Elektra/Asylum or Atlantic or other companies?

A. No, just Warner Brothers.

Q. Now, before we turn to an explanation of the

8-6
1 component costs of that \$600,000 -- over \$600,000 figure you
2 just quoted, can you describe Warner's current royalty payment
3 system for publishers and describe why these costs that you just
4 quoted would be incurred?

5
6 COMMISSIONER JAMES: Excuse me. That's a one-time cost?

7 THE WITNESS: That's a one-time set-up cost.

8 COMMISSIONER JAMES: You're not talking about every
9 year, \$600,000?

10 THE WITNESS: No. That's a one-time cost.

11 Well, basically, the current system that we have at
12 Warner Brothers is not related to any type of a percentage
13 royalty rate for the payment of publishers' royalties. Every-
14 thing is instituted on a flat fee basis.

15 I do have a percentage royalty system with respect
16 to the artist royalties that are payable but they are two
17 totally completely separate systems as designed within Warner
18 Brothers.

19 In order to implement the proposal as it has been
20 presented, it would be necessary for us to actually start from
21 scratch. It is almost like taking a manual program and changing
22 it to a computer.

23 What is in my system currently is not useful in this
24 situation other than the fact that I do have the tune titles
25 program and they are tied in with the publishers' name and
addresses. Everything else would not be able to be employed at

8-7

1
2 all.

3 CHAIRMAN BURG: Ms. Cranston, would you have the
4 timing in your records?

5 THE WITNESS: No, I do not; I do not.

6 BY MS. PHILLIPPS:

7 Q. Would the proposals submitted by the publishers
8 affect your entire repertoire of licenses at Warner Records?

9 A. Well, as I understand the proposal, yes, it certainly
10 would. We would have to have someone or somebody actually go
11 through the entire repertoire of licenses that Warner Brothers
12 has on hand which is some 90,000 licenses for Warner Brothers
13 alone to implement them into the system.

14 Q. Now, I understand that you have prepared some figures
15 for the Tribunal and we have a chart here that I would like to
16 introduce as RIAA Exhibit "W." And it shows the breakdown of
17 the over \$600,000 cost of implementing the publishers'
18 proposal.

19 (RIAA Exhibit "W" was marked for identification.)

20 BY MS. PHILLIPPS:

21 Q. Now, Ms. Cranston, would you go through each of the
22 costs and explain exactly what would be involved in reaching
23 these costs?

24 A. Certainly. I will try and give you a brief descrip-
25 tion of what each of these particular items is. I think that the
chart itself tells you how we arrive at the rate because it's

8-8

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

basically dependent on what these types of individuals get as far as an hourly wage is concerned.

And by the way, these costs are all based on a one-year start-up time, in other words, we have figured that we would need at least a year's start-up time to enter into this type of a proposal and assuming that we think we can manage to do this type of thing on this basis.

Item number one would be the actual system design itself which would require an actual systems designer. This is one individual who really takes the requirements of the company as it's related to a project and actually tries to design a system implementing that; in other words, he tries to find all of the facts that are necessary to -- or all of the things that are needed by the various individuals utilizing this system and he puts them together and it's kind of the base, the beginning designs of the system.

This type of an individual, as you can see, currently is being paid \$44 an hour which means on a ten-month basis at 22 days a month, we're talking about \$77,440 alone.

COMMISSIONER GARCIA: Are you proposing to do this in-house?

THE WITNESS: Pardon me?

COMMISSIONER GARCIA: Is this going to be done in-house or are you going --

THE WITNESS: This would be done in conjunction with

Accurate Reporting Co., Inc.

(202) 726-3801

8-9

1 Warner Brothers Pictures data center which we utilize for our
2 royalty systems. It's not really in-house as far as Warner
3 Brothers Records is concerned.

4 Item No. 2 would be the actual program analyst and as
5 you can see, we're looking at about six months of his time at a
6 total cost of \$40,656. This individual actually now takes the
7 written vernacular as presented in the systems design and
8 attempts to do an overall design in programming logic.

9 He establishes the flow charts. He decides how many
10 disc packs or tape drives you may have to utilize for your
11 actual system, what your programming time would be. Oh, there is
12 probably a hundred other things he does too but I think that
13 pretty much gives you an outline of his function.

14 The second thing would be what we call the Cobal
15 programmers. That's Cobal which stands for Common Office Business
16 Oriented Language programmers. These are the individuals who
17 actually take the English language and turn it into Cobal
18 language which is the common computer language utilized today.

19 This would take a staff of at least four people, each
20 getting \$35.20 an hour for a total of ten months and that
21 equates to \$247,808.

22 Next on the list we have the temporary staff to
23 create the input. And this would be basically a temporary staff
24 of approximately six part-time people hired within my department
25 whose function it would be to go through all of the licenses in

8-10

our files together with label copies indicating the timing on the records and actually gearing up the information necessary to feed into the computer program.

The cost of that temporary staff at about seven months time would be \$73,181. No. 5 is an item called "conversion of the file" and this is conversion -- I think I explained to you what we could use out of the old system basically would be the tune title numbers and the publishers' names and addresses. This would have to be converted to a new system as well as all of the new input information now converted into the language of the new system.

We anticipate that cost to be about a four-month project and the cost would be \$49,561. Now, after you have all your information put together it's necessary to have what you call computer test time to make sure that this grand new plan that you have designed actually works and will give you the publishers' statements and publishers' licenses that you need insofar as your master royalty system is concerned. That's \$55,000.

No. 7 is called the yearly increase in programming at 25 percent which is about \$66,000. This is basically as a result of the additional paper and additional input put into a system and it's based on what the current costs are and we have just increased it by 25 percent in order to come up with this figure.

It may be low; it may be right on. I don't know at

Accurate Reporting Co., Inc.

(202) 726-3801

8-11

1
2 this point until you start your actual processing time.

3 COMMISSIONER COULTER: Excuse me. Could you expand on
4 that a little more? Why you would anticipate this increase?

5 THE WITNESS: Because of the massive amounts of infor-
6 mation now that would be reset into the system. And obviously
7 if we are going to gear to a system we would like very much to
8 have the computer actually put together a request for a license
9 for you to go out to all the various publishers. This is a great
10 deal more paper work and computer time utilized than what we
11 currently do under our present system.

12 We anticipate that the input of documents into the
13 system to update your master royalty file would probably be
14 at least twice a month. Currently we only update our files once
15 a month. It's this type of anticipation we're talking about
16 with the increased programming, our cost in actual processing
17 of the paper work going through.

18 COMMISSIONER COULTER: Why would you have to do it,
19 you said twice a month?

20 THE WITNESS: Because of the volumes necessary, the
21 volumes of paper necessary going in in order to feed the computer
22 the information, to be able to come out with a license request.
23 As far as the actual proposal is concerned, I think you will
24 notice that it requires that each time you have a change in the
25 retail selling price for a given record, you have to notify all
of the publishers involved individually with respect to that

8-12

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

price change.

COMMISSIONER COULTER: But that is that you're talking about, the increase? Is there any other part of it --

THE WITNESS: Well, you'd make the notification of change. We would anticipate a normal time lag in the first year of just getting these particular licenses flowing on an even keel as between the publisher and the manufacturer which is why the input would probably go in more than once a month.

COMMISSIONER COULTER: But I thought that was the first year. I thought this yearly increase --

THE WITNESS: That's only a year.

COMMISSIONER COULTER: -- is for subsequent years?

THE WITNESS: No, no, no. I'm talking about a one-year cost in this. I'm saying that this 66,000 is this year's yearly increase. The overall system is designed to be put into effect over a year's period of time. And the costs that I have incorporated here are only for one year as far as everything on this sheet is concerned.

COMMISSIONER COULTER: Okay. That would be the increase for the first year?

THE WITNESS: Exactly.

COMMISSIONER COULTER: But you would anticipate -- that's due to the increased amount of paper work on a given license; is that correct?

THE WITNESS: Yeah. And the initial amount of paper

8-13

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

that would have to go in to feed the system to begin with, yes.

COMMISSIONER COULTER: That initial amount of paper, though, would be re-writing the original licenses, right? You would have to re-write them up or --

THE WITNESS: Well, we would have to actually request a great number of new licenses. All the licenses that have the statutory language in them we would have to request a new license because that rate is no longer good. We have to notify the publisher of what the percentage of timing is that he has on the given record and related to a penny rate for him.

Obviously, if we have been paying 2 3/4 cents in the past it is not going to be that under a percentage royalty system that's specifically not at six percent.

All the rates will change basically that are statutory linked.

COMMISSIONER COULTER: I'm just trying to see why it would involve any more paper work than what you, you know, have got here. Once you have the license written.

THE WITNESS: Once I have the -- I have to request them all again. I already have them in file. I'm saying now I would have to not only request new licenses which is done on a normal routine basis now but go back and re-request all of these other licenses from the publishers that now would be affected by the statutory rate.

COMMISSIONER COULTER: I thought you said there was

8-14 1 more paper work involved with a given license -- there would be
2 more paper work involved with a given license?
3

4 THE WITNESS: Yes. I would say there probably would
5 be, the reason being that now I would have to put the informa-
6 tion into the computer before I have actually even requested the
7 license.

8 Now, the license is requested by hand. You don't up-
9 date your master royalty file in the computer until such time as
10 you have requested your license or gotten a license back if you
11 don't have sales.

12 You don't really need the information in the computer
13 until you have had your first sale generated so that you can now
14 take that sale and apply it to the royalty rate in order to pay
15 or set aside X number of royalties due on that composition for
16 the publishers.

17 Now, I would have to have this into the system before
18 we actually had any sales in order to feed the publishers and
19 get an actual license from them, send them out a request out of
20 my computer. Then it comes back to me and now I put it in to the
21 computer again at which point it comes out of suspense and
22 becomes a legitimate payable rate.

23 CHAIRMAN BURG: Didn't you mention before also that
24 any percentage rate would come out differently depending on the
25 price that was attached to -- so that if there was \$7.98 album --

THE WITNESS: Oh, yes, yes.

8-15

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

CHAIRMAN BURG: -- that any percentage rate would change depending upon the price of the product that is attached to it. Is that what you said earlier?

THE WITNESS: The percentage rate would remain the same, would be in the same --

CHAIRMAN BURG: -- but the result of it would be --

THE WITNESS: The penny rate would change based on what your retail selling price is and this is what is involved in this specifically in this proposal is that if you do move from a \$7.98 to a \$8.98 level, you are to now notify them of your price change and let them know what their share now is of the royalties that are payable as compared to what you originally requested it at.

You would also have to re-request a license for every mix that it was involved in. If you have one license basically for an album and you -- well, let's see, how should I explain this?

You definitely have to have a new license for every single that is released because a single mix, the penny rate would change. You would have a different rate with respect to that same given tune used in another line-up. Where there might be one more song added to the album it would change the whole structure of all of the rates within a given album.

Every time you've got a change of timing it changes the make-up of the entire album.

8-16

1
2 COMMISSIONER COULTER: Excuse me. My understanding
3 was that -- you said that you would have to do this, re-write
4 all of the 90,000 licenses you've got. Is that what you said?

5 THE WITNESS: Absolutely.

6 COMMISSIONER COULTER: In this proposal though, they
7 say that this adjustment of a royalty shall apply to all phono
8 records made and distributed on or after the effective date of
9 these regulations.

10 Now, if you are not making records for all of those
11 90,000 licenses and I assume you're not, why would you have to
12 re-write them unless you're going to make a record of them?

13 THE WITNESS: Well, actually that is everything that
14 is in my system and if I am going to change a system I really
15 have to put all bits of information that I have on hand. I'm not
16 just going to destroy all of these licenses that I have over
17 here.

18 And you're right. Some of them may not be selling.
19 I may not be releasing an album currently. However, we do uti-
20 lize those files in conjunction with information for overseas
21 sales. The countries overseas, as a matter of fact, are still
22 selling and recording royalties on the Everley Brothers. We
23 have had them cut out of our catalogue here for a long time.

24 But I do have to have the information available to
25 provide to my licensees who wish to issue a record. And that
includes the timing and the particular credits that are involved

8-17

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

so that the publishers can get their direct payments from the overseas publishers, et cetera.

But also, there can be a given mix. Even though I have a penny rate license which one would assume would not be affected by this proposal, if I have within the mixture of an album a penny rate tune I have to know what that is in order to calculate all of the other statutory licenses because it takes that into consideration in apportioning the units in the proposal. Any time I have a mix I have to know what the penny rate is or even if it's a PD tune, a public domain tune.

COMMISSIONER COULTER: How many of the 90,000 licenses have you currently made into records?

THE WITNESS: Just in domestic use? Are we talking about just limited as far as the United States is concerned?

COMMISSIONER COULTER: If that's the easiest way to handle it, sure.

THE WITNESS: This would be a very rough estimate but I would guess 50,000 to 60,000 out of that, at least.

COMMISSIONER COULTER: Are you currently making records?

THE WITNESS: In one form or another, yes.

COMMISSIONER COULTER: And how many would you say are still operating abroad? How many records are you selling abroad?

THE WITNESS: Well, it could conceivably be about the

8-18

1 same. It might be a different mix out of the licenses but the
2 quantity would be probably somewhere in the same neighborhood.
3

4 COMMISSIONER COULTER: Would it be fair to say, though,
5 that your decision to re-write the remaining 40,000 or 30,000
6 is a decision that you would make on your own simply to be
7 consistent in your entire operation but it would not necessarily
8 be required by the regulation itself?

9 THE WITNESS: It's conceivable I would not have to re-
10 write them and put them in the system but I would still have to
11 have somebody go through them and tell me that I don't need
12 this license after they have checked it against whatever
13 releases it was incorporated in.

14 So you are still working with that amount of paper
15 work initially.

16 COMMISSIONER COULTER: But you would say it's a
17 decision that you would make? It wouldn't be necessarily required?

18 THE WITNESS: Whether I put it in or not?

19 COMMISSIONER COULTER: Yes.

20 THE WITNESS: Oh, it would have to be my decision, yes.

21 COMMISSIONER COULTER: Excuse me, go on.

22 COMMISSIONER JAMES: I have a question; I've just been
23 waiting. You indicated earlier to Commissioner Coulter's
24 question "earlier" meaning morning session, that you pay your
25 artists on the retail price?

THE WITNESS: Yes.

9-1

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

COMMISSIONER JAMES: Based on a percentage, I assume?

THE WITNESS: That's correct.

COMMISSIONER JAMES: When the prices are changed on those records, does your artist contract now provide for notification to the artist?

THE WITNESS: No.

COMMISSIONER JAMES: You evidently also have probably reviewed this outside of the president of RIAA, the proposal of the publishers' more extensively than any other witness because you now have a chart on what it would cost.

I'm sure you probably have heard about my famous question. What changes would you make in that suggestion? You mentioned notification each time. To me, that would seem like it would be something that could be eliminated.

What changes would you make? Assuming it's just going to be a percentage, what changes would you make in that proposal to cut down on this cost, to make it easier for you to adjust to that?

THE WITNESS: Well, actually, I guess that definitely is one of the areas that I would eliminate. I think that what is happening with this proposal is that basically you're doing the work for the publishers because they keep talking in terms of a percentage rate but they keep coming down to a penny rate because that's why they want to be notified. It's not because the percentage rate changes but the penny rate actually does

9-2

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

with the given price change.

I definitely would throw that out. I would employ --

COMMISSIONER JAMES: Would notice every quarter
suffice? Every half? Once a year?

THE WITNESS: Actually, well, I really don't under-
stand the necessity for notifying them that the price has
changed. If we are talking about a percentage rate royalty --

COMMISSIONER JAMES: When the figure goes down, they
know that --

THE WITNESS: Yeah, their percentage doesn't change.
I would provide them with the information insofar as what the
penny rate is on the statement together with the retail selling
price. We do that for all of our artists. It's not a matter
that you're going to say, "Here's X number of dollars. Try to
find out how we arrived at that."

COMMISSIONER JAMES: So you can do that without any
other additional costs, I assume? You could do that without
incurring any additional costs?

THE WITNESS: I could do that? What is "that"?

COMMISSIONER JAMES: What you just said.

THE WITNESS: Stop providing them with the notice of
change? Are you talking about the statement?

COMMISSIONER JAMES: The statement.

THE WITNESS: Yes, yes. That would be automatically
incorporated into the system as far as that is concerned. I

9-3

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

would suggest that the publishers are the ones who are requesting this type of proposal and I would say that would it not be fair for them to assume the costs of doing this type of reporting to them.

It seems to me that they should be the ones participating in this type of a system, not the manufacturer. I would also say that any type of reserves that would be involved in this system are going to be absolutely horrific when you are comparing a percentage royalty base to a flat fee base.

I don't know that we'll ever come to absolute conclusions on where the returns should go against these specific reserves. The only thing that would help in a situation like that is perhaps to think of this being prospective on new licenses only and not affecting the existing statutory linked licenses.

COMMISSIONER JAMES: That's all? That's the only suggestions you would make?

THE WITNESS: If I were faced with doing it, I would have to do it.

COMMISSIONER JAMES: I mean you're going on a percentage. And one of the things you mentioned -- well, one of the key elements that you mentioned in response to Commissioner Coulter's question was the time problem.

You wouldn't make any suggestion about time? I think one of your costs that you had to figure out is if it's under a

9-4

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

minute -- it seems to me you might want to suggest exclude anything up to a minute and maybe one minute to eight minutes --

CHAIRMAN BURG: Is this known as leading the witness?

COMMISSIONER JAMES: I'm a commissioner. I can do it any way I want to. I'm trying to give her a broad scope of how else, you know -- she's a professional. How else would you change this proposal? It's going to be six percent, how would you deal with it? To make suggestions and recommendations to us to make your job easier and cut down on this cost. That's really the essence of my question.

THE WITNESS: Well, I would have to say if you made it prospective the cost that you would eliminate insofar as your input in the system would be rather major insofar as people going through licenses, et cetera, and changing all the rates.

I think if we were to eliminate having to notify the publisher that the suggested retail price has changed -- which I don't really see the value of -- it would eliminate a great deal.

COMMISSIONER JAMES: Because you indicated it would reflect on your statement that you sent to --

THE WITNESS: That's correct, that's correct.

COMMISSIONER JAMES: I agree with you on that one.

THE WITNESS: Won a point.

MR. ZUCKERMAN: Commissioner James, let me point out that in fact NMPA agrees with you on that one, that the

9-5

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

regulations as drafted refer to the compulsory license. I believe that during the testimony of one of the prior witnesses we pointed out that the Harry Fox license form waives the filing of a formal notice of intention and that the application of that provision would be also to waive the filing of this type of notification of the computation.

COMMISSIONER JAMES: No other suggestions?

THE WITNESS: Give me a day and I'll think about it.

COMMISSIONER JAMES: All right. I'm going to take you up on that. Take a week and you can submit it by mail through your attorneys any suggestions that you think -- just deal with only the fact that it's going to be a percentage as a hypothetical and then tear their thing up as it would best suit you, your company. Would you do that for me?

THE WITNESS: I certainly will.

COMMISSIONER JAMES: I would appreciate it.

Thank you, Madam Chairman.

BY MS. PHILLIPPS:

Q. Ms. Cranston, can you identify for us on RIAA Exhibit "W" which of these costs would be ongoing costs?

A. To some extent I think there would be definitely ongoing costs with respect to processing title. I assume that the volumes would be greater. I think that -- we haven't really given any specific thought -- and that's another area that should be considered -- to the design of new forms that would

9-6

1
2 have to be implemented into the system, new paper costs, et
3 cetera.

4 I almost feel that it would be necessary for the
5 whole industry and the publishers to agree with respect to a
6 common form to be utilized with even requesting the licenses
7 if the intention is to have the computers do your work for you.

8 There would be definitely a permanent increase in the
9 staff. That would be an ongoing cost.

10 Q. Would there be an increase, an ongoing increase in
11 computer costs?

12 A. Well, with respect to the yearly processing, yes.
13 Now, are you saying is it conceivable that I might have to have
14 modifications to the program? I don't know. I won't know that
15 until I get involved in the system of gearing up for it.

16 Generally, you do have to have them. Nothing seems
17 to be magically right the first time it comes out.

18 Q. Now, can you tell us how you developed these cost
19 figures?

20 A. Yes. I worked in conjunction with the director of
21 systems for Warner Brothers royalties and also in conjunction
22 with the vice president of the International Data Center at the
23 film company.

24 And the three of us sat down and I told them what I
25 needed and they gave me an estimate of what they thought the
cost would be which, incidentally, is probably a little on the

9-7

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

low side because I am using in-house as opposed to going to a data center or a service bureau.

MR. GREENMAN: Excuse me. I didn't hear who she said did this. I missed the beginning of the answer or something.

THE WITNESS: The director of systems for Warner Brothers Records, myself, and the vice president of the Warner Brothers Film International Data Center.

BY MS. PHILLIPPS:

Q. Ms. Cranston, you testified that the cost was a little on the low side because you were using in-house people. To whom are you referring when you say "in-house people"?

A. The Warner Brothers pictures data servicing center.

Q. Now, is Warner Brothers Records charged with the use of computer time and computer personnel associated with Warner Brothers' pictures computer center?

A. Yes.

Q. So that's a whole separate cost, not that you do not presently pay for under the current system?

A. Oh, no. It's a separate cost totally.

Q. Now, the thrust of Mr. Strauss' testimony was that the administration of the publishers' proposal would be very simple. Would you agree that the percentage system would be simple to maintain, implement, and operate?

A. No. I definitely don't think it would be simple to implement, maintain, and operate for all of the reasons that I

9-8

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

have just stated.

MS. PHILLIPPS: I have no further questions, Madam Chairman, at this time.

MR. SHERMAN: Madam Chairman, just before we close out our direct, left open was the objection to RIAA Exhibit "U." You sustained the objection on the grounds of illegibility. I have read the illegible portion in conjunction with the paragraph that appears on RIAA Exhibit "V" and they are, in fact, identical.

And I believe the only other outstanding objection was Mr. Zuckerman for the notion that some corroboration that this paragraph was used in a license. And we have provided a license. I would therefore like the record to reflect if Madam Chairman agrees that RIAA Exhibit "U" may be received into evidence.

MR. ZUCKERMAN: I will withdraw my objection, Madam Chairman.

CHAIRMAN BURG: I was going to agree and he made it easier.

MR. GREENMAN: I would say it seems cumulative and extreme. It doesn't matter but it seems rather cumulative.

CHAIRMAN BURG: Well, whatever it seems it has been admitted into evidence.

MR. SHERMAN: Thank you.

CHAIRMAN BURG: Are there any questions?

9-9

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

COMMISSIONER COULTER: Ms. Cranston, I would just like to go back to your exhibit on these figures, Mr. Cornyn's figures if you have that.

The two artists that received the \$840,000 also contributed to the advanced and recorded costs recouped in that figure, right?

THE WITNESS: That is correct.

COMMISSIONER COULTER: Do you have any idea about how much they got? They probably got a fairly good share of that because they were successful?

THE WITNESS: I really don't know because I wasn't involved at the time this was initially presented. So I don't have all the data as to the individual artists involved.

COMMISSIONER COULTER: Is there any way from your experience to get a handle on what that might be?

THE WITNESS: Oh, yes, it's possible.

COMMISSIONER COULTER: What --

THE WITNESS: Not here. I would have to get the information from the West Coast for it.

COMMISSIONER COULTER: They got about a third, a little more than a third of the total royalties credited to artists, right?

THE WITNESS: The actual royalties paid?

COMMISSIONER COULTER: Yes. Those two artists got a third --

9-10

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

THE WITNESS: That's correct.

COMMISSIONER COULTER: Would they have gotten a third of the advances, recording costs recouped?

THE WITNESS: They obviously recovered all of their advances and recording costs but I don't have in front of me specifically what their costs were. They may have been very high or they may have been very low. I would have to research that.

COMMISSIONER COULTER: You don't think they would have gotten a third of that?

THE WITNESS: I really can't say; I don't know.

COMMISSIONER COULTER: You were talking about the burden of having to notify whenever there's a price change. It's my understanding that records are denominated and the denomination is, say, on this new line \$5.98, \$7.98 or \$8.98; is that correct?

THE WITNESS: That's correct.

COMMISSIONER COULTER: When was that last changed?

THE WITNESS: Well, you have -- I'm not sure that I understand the words "When was it last changed?" We released the \$5.98 catalogue in mid June of this year.

COMMISSIONER COULTER: Okay. And before that, there weren't any records selling at \$5.98?

THE WITNESS: That's correct, not for many years.

COMMISSIONER COULTER: Okay. But prior to that,

9-11

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

records were selling, albums were selling at \$7.98?

THE WITNESS: \$7.98, \$8.98 level. You have some records that sell for \$9.98. It depends on --

COMMISSIONER COULTER: The records that have been selling at, say, \$7.98 or \$8.98, when did they have a different when was the last time they had a different suggested retail price?

THE WITNESS: Well, that is a changable price right now in today's market. They have been attempting to establish the \$8.98 price line. They haven't been successful with it with respect to all artists so right now you have variable pricing within artists. Some are \$7.98; some are \$8.98.

COMMISSIONER COULTER: Okay, I know. But there is a standard suggested list price of \$7.98 for a lot of records, right?

THE WITNESS: The bulk of my catalogue carries that as a price, yes.

COMMISSIONER COULTER: When was that? When --

THE WITNESS: Oh. When did we grow to the \$7.98 level?

COMMISSIONER COULTER: No. When was there not a \$7.98 price?

THE WITNESS: When was there not a \$7.98 price?

COMMISSIONER COULTER: Yes.

THE WITNESS: Other than specialty items?

COMMISSIONER COULTER: Yeah. As a standard price.

9-12

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

THE WITNESS: We moved into the \$7.98 level, I believe, in February of 1977.

COMMISSIONER COULTER: '77?

THE WITNESS: Yes, so prior to that.

COMMISSIONER COULTER: February of 1977. Okay. The records that you considered having a suggested retail price of \$7.98, what were they selling at before?

THE WITNESS: \$6.98.

COMMISSIONER COULTER: \$6.98. So you go up a dollar denominations, is that fair to say?

THE WITNESS: Generally, yes.

COMMISSIONER COULTER: Do you anticipate changing from \$7.98 or \$8.98 to \$9.98 any time in the near future?

THE WITNESS: I'm not aware of any proposed change. You are referring now to an entire catalogue change?

COMMISSIONER COULTER: Well, yeah, sure, I mean, because it's done that way.

THE WITNESS: I'm not aware of any eminent change that we're going to move everything from the \$7.98 to the \$8.98 level.

CHAIRMAN BURG: Commissioner, excuse me, you're losing me. Are you discussing the one-time cost or the yearly increase?

COMMISSIONER COULTER: No. I'm talking merely about the prices of the albums.

CHAIRMAN BURG: And not how it relates to this new

9-13

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

system?

COMMISSIONER COULTER: Not necessarily. Would you say that changes of that magnitude of suggested retail prices occur fairly infrequently?

THE WITNESS: More infrequently now than they did in the past.

COMMISSIONER COULTER: Is that one of the reasons you don't notify artists of the changes, of those changes?

THE WITNESS: No. I have never really been required to notify the artists of any changes in retail nor -- not just the artist but I have many licensing arrangements with contracts for overseas where they pay me a percentage royalty. And they never tell you they are changing in retail selling price.

COMMISSIONER COULTER: Why is that? They just trust your --

THE WITNESS: Well, yeah. We have a percentage royalty arrangement with them. And they report to us based on whatever they have sold it for. At the time the report comes to you, they indicate to you, "We filled so many units at X number of dollars per unit" and another thousand at a lower rate or whatever the prevailing price happens to be at the time.

COMMISSIONER COULTER: They just figure you will know it?

THE WITNESS: They don't notify us in advance and say, "Watch your next statement because you are going to get

9-14
1 more or less royalties on it."

2
3 COMMISSIONER COULTER: To return to an issue that I
4 attempted to understand with you before -- I'm afraid I was
5 unsuccessful and I'm sure it's my fault -- it's not clear to me
6 why if you wrote a license under this new system, if, say, why
7 it would require more paperwork because I think you said it would.

8 THE WITNESS: Yes, I did.

9 COMMISSIONER COULTER: Each given license would have
10 two pieces of paper rather than one piece of paper or whatever
11 it is. Is that correct?

12 THE WITNESS: Basically, yes, I think that is.

13 COMMISSIONER COULTER: Why is that?

14 THE WITNESS: Well, because what I'm anticipating with
15 this particular system is having the computer actually generate
16 the request for me to the publishers.

17 Again, I say that this is based on the fact that this
18 particular proposal requires that you notify the particular
19 publisher you're requesting the license from of everybody else's
20 percentage of the record, all tunes that are in the record, and
21 what the allocation of timing is to them so that they know the
22 amount, the unit rate that you're giving them is correct.

23 Now, that's a great deal more work than what we do
24 under our current system. Therefore, once we have programmed
25 the computer with all the necessary bits of information the idea
would be to submit a release to the computer with the label

9-15

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

copy indicating what's there and have it prepare for you the actual request for license. And they could do it for each and every publisher rather than having to sit by hand and do all of this.

Now, it's not a function that is done now. That is why it is extra paperwork involved.

COMMISSIONER COULTER: In other words, you take a given record and you've got, say, the ten tunes on it. And they don't all belong to the same person. If they all belonged to the same person -- well, you would still have to go through the steps as you did --

THE WITNESS: As I understand the proposal, yes.

COMMISSIONER COULTER: And you would have to have a mechanism to relate the time to the rate. Is that the problem that you're speaking about?

THE WITNESS: Well, according to the proposal, yes. You relate the timing to what they consider to be a unit method in apportionment of the rates. If it's within certain specific ranges of time, it's -- well, if it's under a minute it's worth a third of a unit, you know, that sort of thing. That's why you need the time; you have to relate it within that factor.

Then you add all those up and you come up with your total units in your record and apply it to the suggested retail price in order to allocate these various rates.

9-16

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

COMMISSIONER COULTER: I know those steps but they don't strike me as necessarily difficult steps for a computer.

THE WITNESS: That's why I would like to put it on a computer.

COMMISSIONER COULTER: So the cost that is really turning something that's manual into computerized, that's --

THE WITNESS: Absolutely, absolutely.

COMMISSIONER COULTER: But once it's on the computer and you just run through these ten different songs or whatever it is, how is that going to demand an extra piece of paper on the license itself?

THE WITNESS: Well, because you'd have ongoing releases, hopefully. You would continue to have new releases going out on the market for which you would be continually feeding your computer information in order to prepare for you.

COMMISSIONER COULTER: Okay. The computer would do this under the new system that you're talking about. But how manually when you put out a new release, you don't have to send anything to the publisher?

THE WITNESS: Oh, we do send it to the publisher. A request is done by hand.

COMMISSIONER COULTER: So the only difference would be it would be computerized rather than manual?

THE WITNESS: Exactly. A much more sophisticated request.

9-17

1
2 COMMISSIONER COULTER: But you could do it manually
3 if you wanted to?

4 THE WITNESS: Yes, I guess I could. It may be that
5 they won't be able to design a system in order to do that
6 although I'm told that computers can do anything.

7 COMMISSIONER COULTER: I still don't understand why
8 you need more -- I understand maybe there might be some more
9 calculations involved but they are still relatively simple
10 calculations. But I don't see why this would demand another
11 piece of paper in the license itself. I'm sorry, I'm still --

12 THE WITNESS: Well, I think basically it's because --
13 I'm really putting the information into the computer one
14 additional time because I'm asking the computer now to print
15 out my request for me which I previously was doing by hand over
16 here.

17 Now I'm feeding the information to the computer. And
18 that has to be put into the computer and incorporated into the
19 master royalty in order for the computer to act on that
20 information. Now, the computer gives me back the request which I
21 now send to the publisher. Then hopefully the publisher turns
22 around and sends that request back to me.

23 Now, at the time the request has been generated I have
24 alerted the computer that I am about to release something and it
25 has put some information within the computer in a suspense area.

Now, when the actual form would come back from the

1 publisher as an improved license, it could now go back to the
2 computer again and become a fact and come out of suspense and
3 as a payable royalty rate assigned to a specific publisher.
4

5 COMMISSIONER COULTER: You're talking about the sys-
6 tem as it exists now?

7 THE WITNESS: No. This is what I would do.
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

9-18

end 9

JW

1 MR. COULTER: I thought you said you have some
2 of the stuff already on the computer.

3 THE WITNESS: Publisher name and address, but I
4 don't have the timing and all of my rates are, of course,
5 based in terms of pennies.

6 MR. COULTER: But you do have the rate down
7 on a computer too, right?

8 THE WITNESS: I have a flat fee rate in the
9 computer, yes.

10 MR. COULTER: So what you are missing, now, you
11 are missing any timing. You don't have that.

12 THE WITNESS: That is correct.

13 MR. COULTER: And it is expressed as a flat
14 rate rather than a --

15 THE WITNESS: Does it have -- when they use
16 these expressions, statutory or percentage of statutory,
17 is that in your computer?

18 THE WITNESS: No.

19 MR. COULTER: It isn't?

20 THE WITNESS: Not with respect to publishers.

21 MR. JAMES: What happens if you have a 6-minute
22 record now?

23 THE WITNESS: Under the current statutory law?

24 MR. JAMES: It is computed based on a half a
25 cent per minute.

MR. JAMES: It comes out of the computer?

Accurate Reporting Co., Inc.

(202) 726-3801

lj 10-48

1 THE WITNESS: No, it is done by hand.

2 MR. COULTER: Okay, and you -- now, this
3 request that you send to the publisher, are those run out
4 by the computer?

5 THE WITNESS: Today?

6 MR. COULTER: Yes.

7 THE WITNESS: No. They are done by hand.

8 MR. COULTER: Okay, I assume this kind of
9 thing is a computer --

10 THE WITNESS: That is from the Harry Fox --

11 MR. COULTER: This is computerized.

12 THE WITNESS: It appears to be.

13 MR. COULTER: And that is what you would envisage?

14 THE WITNESS: Exactly.

15 MR. COULTER: So you are missing the timing
16 and the calculation of percentage times. You are missing
17 a calculation factor in the way --

18 THE WITNESS: Yes, I am missing the percentage
19 rate, yes.

20 MR. COULTER: And then -- as it comes out of
21 the computer now, then you type up the letter by hand,
22 is that the way it operates?

23 THE WITNESS: Well, actually it is not even in
24 the computer at the stage that I type up the request by
25 hand. I haven't fed the information to the computer at this

1 point. We have received the information let's say from
2 the label copy area and manually the people within my
3 publishing department ascertain what type of a license it
4 is, that has to be requested, and a pre-printed form which
5 is manually filled out, goes back to the publisher at the
6 request for licenses.

7 MR. COULTER: Okay, I am trying to understand
8 how you relate it to your own computer as it is now.

9 When you have a tune or something like this,
10 a new release is coming out, you put that request for
11 information into the computer. Is that correct. As it is,
12 you just -- and then you get back the name of the publisher --

13 THE WITNESS: Well, actually, no, it is really
14 not quite like that.

15 MR. COULTER: Okay.

16 THE WITNESS: The input of master royalty, those
17 in the computer on a monthly basis, let's say you have
18 a request to license from the Harry Fox agency and you
19 have received the license back and you also have a sale
20 this month on a new album. You have to input your informa-
21 tion into the computer based on that album, listing the
22 album number, and that you have a license at 2 cents or
23 at 2-3/4 cents for that given album, and if gets fed into
24 all of the 8 megabits of information that is stored
25 within the computer as master royalty information.

1 MR. COULTER: Okay. That is not quite
2 what I was trying to drive at.

3 THE WITNESS: This is when it goes in initially.

4 MR. COULTER: Okay, but I thought we were
5 talking about the paperwork involved in sending out
6 requests for licenses.

7 THE WITNESS: Okay, that would be the new
8 system, yes.

9 MR. COULTER: But under the current system,
10 when you make a request out for a new license, there
11 -- a computer isn't involved at all?

12 THE WITNESS: Not at the request stage, no.
13 It is all done by hand.

14 MR. COULTER: Okay, you send out the request
15 for it by hand and you get it back. At that point, you
16 go through the steps that you have just described.

17 THE WITNESS: That is correct.

18 MR. COULTER: And then the -- then when you
19 are notified of a sale, then you use that information to
20 pay the publisher, is that correct?

21 THE WITNESS: Yes. That sale is matched
22 against the royalty rate that is established in the system
23 and it generates a payment due a publisher.

24 MR. COULTER: Except for having to multiply
25 by a percentage rate, the steps of the proposed new system

1 would still be identical though, wouldn't they?

2 THE WITNESS: Excuse me; would you repeat that?

3 MR. COULTER: Except for having to calculate
4 that percentage and time, except for calculating the
5 payment, would be the same under this new system as that
6 before?

7 THE WITNESS: No, not really. Under the
8 present system I don't take into consideration the retail
9 selling price of records. Under this system, I would have
10 to take in consideration --

11 MR. COULTER: Well, that is just another piece
12 of information on the computer. That doesn't change
13 any of the processes.

14 THE WITNESS: Well, now you just take units
15 times flat rate and it multiplies it and gives you
16 whatever the amount is due the publisher. Now you would
17 have to feed in the retail selling price, the percentage
18 rate would go against this --

19 MR. COULTER; Right.

20 THE WITNESS: -- which would give you a penny
21 rate, which would take this times a number of units and
22 then give you --

23 MR. COULTER: Exactly, but as far as your
24 process of feeding the information into the computer,
25 and the relationship to the publisher, the steps that you

1 take internally, the computer, the steps that you have
2 to go thru physically would be identical, wouldn't they?
3 I don't see any extra step that you or your staff would
4 have to use.

5 THE WITNESS: Well, assuming that the calcula-
6 tion -- request has the calculation on it. If the computer
7 actually generates my request for a license, then no. The
8 staff, other than keeping track of the information,
9 wouldn't have additional work.

10 MR. COULTER: Yes, but I thought we were on the
11 steps after the request for the license.

12 THE WITNESS: Oh.

13 MR. COULTER: Because now you don't use the
14 computer to request the license, right?

15 THE WITNESS: That --

16 MR. COULTER: You use the computer for related
17 steps, is that right?

18 And those later steps are primarily involved
19 with the publisher, is that correct?

20 THE WITNESS: Yes, there are also many by-
21 products of the information that -- within the system for
22 internal purposes such as accruals on your publisher on a
23 monthly basis, so that your liabilities are --

24 MR. COULTER: Right.

25 THE WITNESS: Your reserve system is established

1 all sorts of things other than just generating publisher
2 statements.

3 MR. COULTER: Okay, but it is all related to
4 the payments of publishers --

5 THE WITNESS: Yes, yes.

6 MR. COULTER: And once you have put that
7 information on a given record or song into that computer,
8 you simply use the computer to get the subsequent in-
9 formation and send presumably the publisher the check
10 or else alert yourself to what potential check may be.

11 THE WITNESS: Yes.

12 MR. COULTER: Under the new system, under this
13 proposed system, you would use the computer to send out a
14 request for a license, but you don't use it for now?

15 THE WITNESS: That is correct.

16 MR. COULTER: And you would continue to use
17 the computer for the calculations of what you owe the
18 publisher?

19 THE WITNESS: Yes.

20 MR. COULTER: And would there be any complication
21 to those computer calculations other than that related to
22 the suggested retail price, timing and the precentage rate?

23 THE WITNESS: Would there be any other --

24 MR. COULTER: Additional calculations in your
25 computers other than those three factors?

1 THE WITNESS: In order to request the license
2 no, that is --

3 MR. COULTER: I am not talking about
4 request the license.

5 THE WITNESS: Subsequent to that?

6 MR. COULTER: Yes.

7 THE WITNESS: I don't -- I can't really see
8 that there would be anything else other than perhaps
9 increased data input.

10 MR. COULTER: I am just talking about the
11 calculation.

12 THE WITNESS: No, I don't -- off the top of
13 my head, see anything else.

14 MR. COULTER: And -- thank you very much.

15 MR. JAMES: To an earlier question in the
16 morning, I think you answered Commissioner Coulter that the
17 producers are on salary.

18 THE WITNESS: The in-house producers.

19 MR. JAMES: In-house producers are on salary.
20 How many in-house producers do you estimate there are?

21 THE WITNESS: Actual producers who go to the
22 studios, not just within our department.

23 Creative actual producers on the staff.

24 MR. JAMES: Let me indicate what my confusion
25 is. Do they come under the AAR section?

1 THE WITNESS: Yes.

2 MR. JAMES: Okay, good, then I need to know
3 an estimate of what your -- how many are on salary that
4 are in house.

5 THE WITNESS: That are just creative producers?

6 MR. JAMES: Right. Is there a difference?

7 THE WITNESS: Well, there is a great -- there
8 is on our staff for listening -- that don't actually go
9 out and produce the record.

10 MR. JAMES: I am talking about the producers
11 that gets part of the some type of royalty from a record
12 that is sold that you indicated is on salary. Roughly
13 how many?

14 THE WITNESS: I would have to say about 8-10.

15 MR. JAMES: Okay, and would you know what
16 their average salary is?

17 THE WITNESS: No.

18 MR. COULTER: The question I asked, I asked,
19 was that included in the recording costs, and I think you
20 said no.

21 THE WITNESS: That is correct.

22 MR. JAMES: Your company was one of the companies
23 that filled out the CRI. Did you have any input into that?

24 THE WITNESS: I could have.

25 MR. JAMES: Because one of the questions

1 says to include that salary. I know the guy from the
2 A&R vice-president at Warner said his salary was not
3 included, CBS, I am sorry, I am going to read the
4 questionnaire.

5 MR. SHERMAN: I think Butler was saying
6 that his salary wasn't included in the A and R budget.
7 I don't think he was testifying about the CRI questionnaire
8 in any form, and as --

9 MR. JAMES: I know what the record said.
10 The record will speak for itself. I reviewed it. And --

11 MR. SHERMAN: I would be happy to be enlightened.

12 MR. JAMES: No, he said that -- my question
13 to him was, does your salary included for the purposes
14 of determining what is the cost of the record? He said
15 no.

16 MR. SHERMAN: Right.

17 MR. JAMES: I read it last night, that is why
18 I know.

19 MR. SHERMAN: Well, that is consistent with my --

20 MR. JAMES: But the question on Page 5 says
21 "These costs would be consistent with the expenses of the
22 A and R Department." And I think you are saying something
23 different. That the salary of your A & R producers are
24 not included in the costs of the records.

25 THE WITNESS: It is not included insofar as

1 the recoverable costs to the artist.

2 MR. JAMES: Let me try to explain my
3 question. I am trying to understand, well, maybe the
4 easiest way to do it -- your counsel has a statement to
5 make. I think maybe I will -- do you have that information?

6 MR. SHERMAN: Me?

7 MR. JAMES: No. Looking back over the --

8 MR. SHERMAN: You are looking at --

9 CHAIRMAN BURG: Excuse me, please; would you
10 give your name for the record?

11 MR. SORKIN: Sure, Bernard R. Sorkin, S-o-r-k-i-n,
12 and I am an attorney in the Legal Department of the Warner
13 Communications. When I was here on July 2 in response to
14 Commissioner James' question, I suggested that I would
15 provide information with respect to Items 1, 2, 3, and 4
16 and 22 in the questionnaire which we did submit. I am
17 sorry to say, and I can do no more than offer my apologies
18 to Commissioner James and to the Tribunal generally,
19 I have been overruled.

20 I have been overruled by my principals on two
21 grounds. First that insofar as information is available
22 at all without literally many, many months of digging,
23 I am told, it is only for the past 10 years -- and for the
24 past 10 years with the exception of items, the last 2
25 items, 21 and 22, it is considered highly sensitive and

1 confidential.

2 So I am afraid that in spite of my prior
3 statement to the Tribunal, I am unable to supply that
4 information.

5 MR. JAMES: I have no further questions.

6 CHAIRMAN BURG: Before we recess, let me
7 say that it is rather apparent that we will be slipping
8 over to tomorrow morning. And the room has been secured
9 so you can --

10 Tomorrow morning. We will not be able to
11 finish with this witness today. Well, we may be, but
12 it is 2:55. I don't see that we are going to sit until
13 7:00 tonight to do it. But anyway, let's recess.

14 (Recess.)
15
16
17
18
19
20
21
22
23
24
25

1 MR. COULTER: Just one last question.

2 On your Item 7 here, the yearly increase in processing at
3 25 per cent. I understand your figure thatthatgoing to
4 be an amount that you will -- that you will be saddled
5 with the first year.

6 THE WITNESS: Yes.

7 MR. COULTER: But are you suggesting that
8 you anticipate continuing increases in expenses for
9 processing for subsequent years of that amount?

10 THE WITNESS: Well, I already paid a fee for
11 processing. There would be a continued fee for processing.
12 This figure of \$66,000 really only represents 25 per cent
13 of what my annual fee is now for processing time.

14 So on an ongoing basis, we would still have
15 that particular processing time, and I really don't know
16 until the system is implemented, exaclty what it will
17 cost in terms of ongoing situations.

18 MR. COULTER: But are you -- I assume that these
19 are -- you said yourself, these are all estimates.

20 THE WITNESS: Yes.

21 MR. COULTER: But are you estimating that
22 your processing time will continue to be that much more
23 expensive every year?

24 THE WITNESS: I don't know at this stage.
25 I really don't know. I know this is what it is probably

1 going to cost me in the first year. Not until the
2 system is really up and running and you know all of the
3 factors involved, can you really determine on a factual
4 basis what your ongoing costs would be.

5 MR. COULTER: Do you think that your processing
6 time -- the increased costs of your porcessing would be
7 much greater?

8 THE WITNESS: Than the 25 per cent shown here?

9 MR. COULTER: Than what you are currently making?

10 THE WITNESS: I am sure it will be more,
11 because I intend to utilize the computer more.

12 MR. COULTER: But the 7 figure wasn't intended
13 to imply that you would have 25 more -- 25 per cent more
14 expense in all such figures?

15 THE WITNESS: No, as I said, I really don't know
16 what that figure would be.

17 MR. COULTER: Well, thank you.

18 CHAIRMAN BURG: Mr. Greenman?

19 CROSS EXAMINATION

20 BY MR. GREENMAN:

21 Q Ms. Cranston, you gave us a time when Warner
22 Brothers went from \$6.98 to \$7.98 on most of their titles.
23 When -- and now, as I understand, some of the titles are
24 selling at \$8.98. But not all. When did the shift to
25 \$8.98 begin?

1 A I believe that there was some \$8.98 products
2 available by the end of 1978.

3 Q And then the most of the ones that are now
4 there went there in 1979?

5 A As they were released, it was selectively done.

6 Q Now, as I understand it the present time, tapes
7 and LPs, sell at the same price. Or the same suggested list
8 price. Is that right?

9 A That is correct.

10 Q But there was a time when they sold at different
11 prices?

12 A That is correct.

13 Q Two years back. On your artists contracts,
14 artist royalties are a percentage at Warner of suggested
15 list. Is that right?

16 A Suggested retail.

17 Q Yes, sorry.

18 And when tapes and LPs sold at different prices,
19 then the dollar amounts of the artist royalties for those
20 two different modes was also different for -- per unit,
21 is that right?

22 A You are talking about with respect to the actual
23 royalty rates to the artist?

24 Q Yes, the actual royalties credited to the artist.

25 A Yes.

1 Q So it would be true for the producer?

2 A The producer would be paid his applicable rate
3 based on the suggested retail price. Yes.

4 Q Were these -- are your artist royalties
5 computed by computer also?

6 A Yes, they are. I specified that earlier.

7 Q Now, do you know how many releases at Warner
8 are re-pressed releases in your catalog are re-pressed in
9 a year?

10 A No, I don't. You are talking about after the
11 initial order goes in?

12 Q Correct.

13 A And you have new orders so you -- no, I really
14 don't. That is not my area of responsibility.

15 Q I say this because of the terms of the Fox
16 license, I asked that because of the terms of the Fox
17 license that has been introduced. My copy, I have RIAA
18 GX with a question mark. This is the one Let Love Use Me.
19 Do you have an exhibit number for that?

20 MR. SHERMAN: That is Exhibit B.

21 BY MR. GREENMAN:

22 A Yes, I do.

23 Q Well, look at the paragraph on the first page
24 that we have talked about. I skip down to the 5th line.
25 I don't think the preamble is relevant here. It says,

1 "However, such parts may on or after January 1, 1978
2 1) shall constitute phonorecords, 2) are otherwise subject
3 to the provisions of said Section 115 as may be varied
4 by the provisions contained on the reverse side hereof
5 in Paragraph (2)," this is the provision that I believe
6 you read, "it being understood that statutory rate shall
7 mean the statutory rate in effect at the time of the
8 manufacturer of such parts, and any royalties stated in
9 terms of a percentage of the statutory rate shall apply
10 to the statutory rate at such time."

11 And I don't believe the rest of it is relevant
12 now. I read that in connection with your statement that
13 you would have to reprogram with respect to 90,000
14 licenses. Mr. Kornan testified on his first day, and
15 I believe it is at page 13, that there were 138 new
16 releases.

17 MR. JAMES: That July 1, counselor?

18 MR. GREENMAN: That is correct.

19 CHAIRMAN BURG: Which page?

20 MR. GREENMAN: Page 13.

21 BY MR. GREENMAN:

22 Q There were 138 new releases, in the year 1979.
23 There is no reason to take issue with that.

24 A Not necessarily.

25 Q Well, looking at this language in the license,

1 is it not true that a change in the statutory rate would
2 affect only units manufactured after the change took place,
3 or after the change became effective, isn't that right?

4 A That is correct.

5 Q So if you didn't -- if you had a license on an
6 outstanding release, until that additional copies of that
7 release were manufactured, which I take it is a practical
8 matter means pressed, regardless of when they are sold,
9 you would pay under the terms of the statutory license
10 at the time they were pressed?

11 A That is correct.

12 Q So until you repressed a release, the change
13 in the statutory rate would not affect the royalty that
14 you would pay on that item? Isn't that correct?

15 A That is correct.

16 Q So until you did repress it, not only would
17 there be no need to reprogram your computer, but you would
18 be incorrect to pay at the higher rate, would you not?

19 A What you are saying is essentially correct.
20 However, there is no information supplied to me with respect
21 to the sales that are coming in that pertains to the
22 manufacture of the record. In other words, in the same
23 manner as the Copyright Act of 1976, affected most record
24 companies, you would have to know with respect to all of
25 your selections in your catalog, what your inventory on

1 hand was, what -- let's say -- your reserves were,
2 prior to the effective date, of the new mechanical
3 license, and establish those within your system as well
4 as saying, "Okay, now, when you have utilized your
5 sales on this, the new rate is in effect," and they
6 don't, by the way, just make records at the end of the
7 given quarter, they make all during a period, and by
8 suddenly having sales that came in, and I wasn't set
9 up for it, it would be impossible for me to pay the
10 publisher, right?

11 Q Well, let's see if we can apply a little
12 ingenuity to this. Suppose there is a change and there
13 is a percentage royalty promulgated, and let's say it is
14 effective January 1, 1982. Be time for a changeover.
15 Is there anything that would prevent your manufacturing
16 processes from putting in an identifying mark of some
17 kind on all albums manufactured at that -- after that
18 date?

19 A You are suggesting that when the manufacture
20 the new album they change for some reason the release
21 number?

22 Q No, they just put a dot on it, anything you
23 want.

24 A But then how am I supposed to read that into
25 my system. I don't see the --

1
2 Q Let me run through it. Suppose they do that.
3 You have somebody who maintains inventory in shifts,
4 don't they?

5 Could they not then inform you at the time
6 when the newly -- the album was carrying the new mark
7 started to be shipped and just advise your unit as to
8 when that date began?

9 Let me give you another alternative. Suppose
10 they just count their inventory on hand and each of them
11 two groups of inventory at the beginning of January
12 1, 1982, now, we are stuck with inventory as of that date.

13 A I can't imagine, really, how that type of a
14 system would work. First of all you are suggesting that
15 I remain with one old system over here and yet I am
16 established with a new system on the other side to be
17 able to pay at an old rate and a new rate to a given
18 publisher. The publisher themselves is -- there is one
19 statement, and I apply all royalties to that particular
20 publisher statement.

21 You are assuming now that I sit here with
22 one system on the one hand and say, "Okay, all these sales
23 came through here, and we generate this through the computer,"
24 while at the same time I have a new and existing system
25 set up, and now for certain specified sales I run those
thru that system in order to come out and somehow magically

1 put them and bind them all together on a publisher's
2 statement? I don't really think that is a feasible
3 answer.

4 Q I am not suggesting that particularly if you
5 have a computerized system, it is simplicity itself to
6 change the rate at which a particular item is billed as
7 of the date that your stock changes. All you have to do
8 is keep track of the number of -- either punch in the
9 number on hand, as of a given date and wait till you
10 ship that number, and then change over at that point.

11 Do you really think it would take anybody
12 long to write a program to do that?

13 A Well, you are asking me to run two separate
14 programs consistently, is essentially what you are asking
15 me to do. Now, if you have a publisher system, you either
16 have everything and all your documentation built into one
17 system in order to make it run on a reasonable basis.

18 You are saying "No, we keep this system
19 over here with my 8,000,000 megabites of core storage in
20 there." That is what you are suggesting to me.

21 Q No, the question --

22 Let me correct this, because I am suggesting
23 that you simply set up a program in which the rate of
24 royalty for a given license changes at the time when you are
25 told that the stock of that item pressed prior to January
1, 1982, has been exhausted?

1 A I suggest to you that the solution you
2 are putting forth here is a much more costly way of
3 handling the publisher's statements than to go through the
4 90,000 licenses or whatever it takes for any specific
5 record manufacturer and implement it all into one system.

6 Q Do you mean to tell me that the cost of these
7 -- the difference is so trivial, if you are going to pay the
8 higher rate on existing stock, even though you don't have
9 to?

10 A No, I am not suggesting that at all.

11 Q Well, then I don't --

12 A I am suggesting to you that we will know, and
13 as I specifically stated before, I will have to build in
14 an inventory level into the new system. I will have to
15 take into consideration any and all reserves that are on
16 hand previous to the date that the new statutory rate would
17 become effective. That would all be part of the new
18 system. You would have to do that.

19 Q All right, you would have to do that, you
20 would have to set up your system so that you pay the
21 old rate on stock that exists --

22 A Absolutely. I am going to have penny rates
23 that will go on forever because I am not tied into a
24 statutory link license.

25 Q All right.

1 A They still have to be incorporated within a
2 system if I am to be able to pay the publishers their
3 royalties. You can't have thr e different systems
4 sitting around.

5 Q Well, you can certainly have three different
6 sets of data in a computer, that is why --

7 A Well, I don't have multiple data within the
8 computer ranging with various rates, there is no doubt
9 about that.

10 Q All right, but let's come back -- we have lsot
11 the original point, which is how many licenses do you
12 have to program the new rate on; you will have to
13 program the new rate, will you not, on new releases of
14 course, which -- let's come back to this figure, Mr.
15 Kornan's figure was 138 albums, if you got 10 copyrights
16 on the album, that is about 1380 licenses for the new
17 releases. Right?

18 A In a year, and you have to program in or
19 punch in the license data and the data necessary to
20 compute the royalty on those licenses for albums which
21 are repressed after the changeover date, isn't that right?

22 MS.PHILLIPPS: Mr. Greenman, I just want to
23 know of the 138 albums that you are referring to, just
24 Warner Brothers and ECM.

25 MR. GREENMAN: Well, who are we talking about
with this 90,000 here?

1 MS. PHILLIPPS: No, I was referring to the
2 130 --

3 THE WITNESS: The 90,000 is my -- the amount
4 of information within my computer system. It represents
5 about 90,000 licenses. That is actually what is --

6 BY MR. GREENFIELD:

7 Q Is that Warner Brothers or the three Warner
8 record companies.

9 A No, that is Warner Brothers.

10 Q Okay, so they are comparable.

11 MR. SHERMAN: What was mentioned was that
12 Warner Brothers also has a label called ECM for example,
13 which would also be administered I believe through Ms.
14 Cranston's department, and Mr. Kornman was testifying
15 just about the Warner Brothers label about the 138
16 releases, so her department has responsibility for far
17 more than 1380.

18 MR. GREENMAN: Wait a minute; how many albums
19 did ECM put out in 1979?

20 MR. SHERMAN: I don't know.

21 BY MR. GREENMAN:

22 Q I am asking Ms. Cranston.

23 A I don't understand the reason for your questions.

24 Q Ms. Cranston, in the first place, I didn't
25 wish to be abrupt about it, but it isn't really necessary

1 that you do, but can you answer the question?

2 A Well, would you re-state the question?

3 Q The question is: Does ECM put out more or
4 fewer albums, releases in a year than Warner Brothers?

5 A I would assume it would be fewer.

6 Q It is a smaller operation. Is it not?

7 A Correct.

8 Q How much smaller? I mean in terms of the
9 volume or anything.

10 A Excuse me.

11 Q In terms of any measure you want. What is the
12 comparison of size between the two?

13 A I don't know that I can give you a comparison
14 of size. I deal only with those particular releases
15 that are released on their label, they are essentially
16 a European firm. I have no idea of the setup on ECM in
17 Germany, for instance,

18 Q Does ECM release in the United States or only
19 abroad.

20 A We handle United States releases for ECM.

21 MR. SHERMAN: I just wanted to point out that
22 Mr. Kornman's testimony related only to the Warner Brothers
23 label and that wasn't the same --

24 MR. GREENMAN: I want to see if we can get some
25 context on the number of copyright items that have to be

1 reprogrammed. The figure I have to start with is 180
2 new releases for Warner Brothers, and some smaller
3 number, apparently undetermined, for a related company
4 called ECM.

5 Is that right, on new releases?

6 A That sounds --

7 Q All right; now, the other group is the number
8 that would be re-pressed a year, but you don't know how many
9 that is.

10 A That is correct.

11 Q But you would be re-pressing, the difference
12 anyway between 90,000 and 1400 plus is about 88,000 to be
13 made up?

14 A I am sorry, I don't know what my current inventory
15 would be on hand at the time that the statutory rate
16 would be in effect, so I couldn't tell you. You know,
17 whether I would have to press on everything. I might be
18 down to stock of 500 units on everything.

19 Q Well, I assume that Warner Brothers would try
20 to re-press before you went out of stock.

21 A I would hope so.

22 Q Yes, I hope the re-press order goes in
23 considerably ahead of the exhaustion of your stock.
24 At least you try to do that, isn't that true?

25 A I am not in the production department; I really

1 would not like to testify as to the methods utilized by
2 the individual.

3 Q But it would be in their interests at least to
4 get the re-pressed order in a couple of months ahead of
5 the exhaustion of the stock, would it not?

6 CHAIRMAN BURG: Why don't we grant that point
7 and get on with it.

8 MR. GREENMAN: All right.

9 BY MR. GREENMAN:

10 Q All right. So at that time, your department
11 could be advised that release, that album, was going to be
12 repressed, could it not?

13 A I assume we could be advised, yes.

14 Q You could then punch in the data on that
15 particular album? Is that not correct?

16 A You are still indicating that we now have my
17 old system over here and we have also now created the new
18 system to be able to handle the percentage royalty rate.
19 Am I following your thinking?

20 Q No. What I am saying is that whatever system
21 you follow, you are going -- if a percentage rate is
22 implemented -- to be paying out some albums on the percentage
23 system and some of them on the fixed rate system, because
24 those -- when you are shipping out those albums and
25 selling those albums that are manufactured before the

1 changeover date, you are going to pay that on the old
2 royalty.

3 A Correct.

4 Q All right. So I assume you are not going to
5 run two systems, you are going to set up one system that
6 accomodates both of them, right.

7 A Correct.

8 Q Maybe you will run two systems and use the old
9 system till you change over that particular item to the
10 new system. That is your choice. You could do it that way,
11 right. You will have to do one of those, right?

12 A Oh, obviously, why wouldn't --

13 Q You don't need to calculate the new rate then.
14 on a particular album, until such time as it is re-pressed.
15 Do you?

16 A I don't need to calculate it?

17 Q Correct.

18 A I would suggest that if we intend to utilize
19 the computer in the fashion that I earlier described,
20 that you would have to program all pieces of information
21 into the computer such as assigning the acutal timing to
22 all of the tune titles, which by the way, are already
23 in the system; I think I did state that as far as the
24 tune titles were concerned, that could be a part of the
25 conversion process.

1 But you are still going to have to input
2 all pieces of information converted for purposes of the
3 new system in order to be able to select from those
4 items an information just based on new releases.

5 If I utilize any of the existing masters that
6 I have on hand, a Greatest Hits album goes out, I am going
7 to be utilizing masters that perhaps have been in my
8 catalog for 10 years.

9 Q But until you ship out the records, physical
10 units that were manufactured after the changeover date,
11 don't need, under this license to pay out a percentage
12 royalty, do you?

13 A Not on the old product. No.

14 Q Exaclty. You don't -- therefore, you are not
15 going to pay it, and you don't know, for instance, whether
16 the album would ever be re-pressed? You don't have to
17 have in the computer the new royalty rates, do you?

18 A You don't have to have, no. I guess you don't
19 have to have the new rates. They wouldn't necessarily
20 be utilized until you actually had a sale, but I don't
21 know that that is the correct approach to take because
22 that means you are always holding a suspense file over here,
23 saying, this still may have to go into the computer at some
24 day, and you are utilizing a person's time on a monetary
25 basis now, to go back and set up based on those old rates,

1 which could have been done in a very fast fashion in
2 front of at the beginning of the program, when all pieces
3 of information are provided for.

4 Q You are saying this is very fast process
5 that you described on Exhibit W?

6 A I didn't hear you.

7 Q You have given us this Exhibit W, which
8 purports to be an estimate of the changeover costs, and
9 now you are telling us that is a very fast process.

10 A Are you referring to the overall chart that I
11 have submitted or only a portion of it?

12 Q I am about to come to the exhibit itself.
13 This whole Exhibit W.

14 A All right.

15 Q The changeover estimate. \$600,000.

16 A I am only referring to the 90 bits of information,
17 which is only one small area within this, that we have
18 been discussing.

19 Q All right, let's go to this item that has to
20 go in here, all this stuff that has to be done. Do you have
21 some wage rates here? As I understand you start at the
22 top with the systems analyst, I believe, that the item that
23 you entitle "systems design."

24 A That is correct.

25 Q And you have got him paid or her paid at

1 \$44 per hour. Do you know what that is per year?

2 A Yes, I can tell you, but that happens to be the
3 going rate for an analyst at Warner Brothers Film Company.
4 That is exactly what it would cost.

5 Q All right; I would ask Mr. Sherman and Mr.
6 Zuckerman.

7 MR. ZUCKERMAN: Don't have my calculator today.

8 MR. GREENMAN: I thought it was mandatory for
9 everybody.

JW12-1

1 BY MR. GREENMAN:

2 Q My calculation is that if we're talking about a 40-
3 hour week as you seem to be in there and 52 weeks per year, I
4 come out with 91,520.

5 Is it your claim that it costs over \$90,000 to hire
6 a systems analyst these days?

7 A Absolutely. This is a factual rate charged by a
8 systems analyst and I would invite you to go out to any service
9 bureau of your choice and find out what the cost would be to
10 hire a systems analyst.

11 Q I have looked at things like "Help Wanted" pages.

12 A I don't think you'd find them in the "Help Wanted"
13 pages. You have to go to a computer data processing center in
14 order to secure this type of an individual.

15 Q Well, I think you'd find they do hire -- let's go
16 down. You've got a program analyst --

17 MR. SHERMAN: Could we ask for the documentation that
18 you are relying on for that statement?

19 MR. GREENMAN: I'll be glad to produce it --

20 MR. SHERMAN: Thank you.

21 COMMISSIONER JAMES: One question I want to get clear.
22 This is a person who is already onboard that works for Warner
23 right now?

24 THE WITNESS: This would be --

25 COMMISSIONER JAMES: I hadn't finished my question.

12-2

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

You have on payroll right now a systems analyst that makes \$91,000 a year?

THE WITNESS: That is the rate charged --

COMMISSIONER JAMES: That's not my question.

THE WITNESS: This is what I as Warner Brothers would pay for a systems analyst is \$44 an hour for their services.

COMMISSIONER JAMES: Let me repeat my question. I think you testified earlier to Commissioner Coulter's question that you work with some systems people to come up with these figures?

THE WITNESS: That is correct.

COMMISSIONER JAMES: Do you have a systems analyst on your payroll now?

THE WITNESS: Warner Brothers Records payroll? No, I --

COMMISSIONER JAMES: Somewhere in Warner's big operation there is a systems analyst?

THE WITNESS: There are many systems analysts.

COMMISSIONER JAMES: Do any of them who are paid by Warner right now get \$91,000 a year?

THE WITNESS: I couldn't tell you whether they physically receive that in their paychecks. I can only --

COMMISSIONER JAMES: Less taxes and insurance and all that other stuff.

THE WITNESS: I can only testify to what the charge would be to the record company. This is the going rate.

12-3

1
2 COMMISSIONER GARCIA: Excuse me. Isn't this just an
3 inter-company charge, what they charge you as opposed to an
4 individual -- that was the statement.

5 And I think that was my original question to you when
6 you said, yes, that you would be using the parent company.

7 COMMISSIONER JAMES: That's just a charge-back fee.
8 Do you really think there's somebody on that payroll at \$91,000
9 a year?

10 THE WITNESS: I think what I'm really trying to demon-
11 strate here is that we have rather sophisticated in-house com-
12 puter systems at the Warner Brothers complex in beautiful down-
13 town Burbank.

14 Any record company going -- and I would probably
15 testify as a fact that Atlantic Records who happens to be a
16 sister company, or Elektra Records who utilize outside pro-
17 gramming services to handle all of their data processing volume
18 would go to their data processing center and in this instance
19 physically cut a check to pay that systems house for this
20 systems analyst.

21 But you're saying, ah-ha-ha, it's really not costing
22 me any money because it's an inter-company charge. Maybe in the
23 overall aspect of the financial statement at your end, you're
24 right, you're shifting monies from one pocket to another.

25 But it is still going against my budget.

COMMISSIONER JAMES: The reason I asked the question,

12-4

1 under Commissioner Brennan's administration, when we first got
2 formed, for ten people the Library of Congress wanted to charge
3 us \$50,000 to program ten people's salaries.

4 THE WITNESS: So you know what I'm talking about.

5 COMMISSIONER JAMES: So I know -- and Commissioner
6 Brennan rightfully so objected. So that's what I'm trying to
7 get at. This ~~SONIA~~ charge over from another -- this figure could
8 greatly be reduced.

9 THE WITNESS: No, it can't be reduced.

10 COMMISSIONER JAMES: Okay. I'll review the record.
11 I'm sorry, Mr. Greenman.

12 BY MR. GREENMAN:

13 Q. There is no reason, is there, once you develop a
14 program that accommodates Warner Brothers that Atlantic and
15 Elektra which have the same data processing center can't use
16 the same program? I'm not talking about the individual titles
17 but the program.

18 A. You mean if they elect to go out. Well, I think I
19 explained this a little bit earlier. I really can't say that
20 they could utilize the same program. They use different systems
21 data processing center than we do. They go to a service bureau.
22 I have no idea of what the hardware is within those particular
23 service bureaus.

24 I don't know that they would even be compatible.

25 Q. I was asked for some documentary support and I have

12-5

1 been handed a Washington Post of July 17, Page C-10.

2 COMMISSIONER JAMES: You were joking, weren't you?

3 MR. GREENMAN: Well, let me just say --

4 COMMISSIONER JAMES: Let's not cloud up the record.

5 CHAIRMAN BURG: Let's get on with it, please.

6 MR. GREENMAN: I would just like to say that there's a
7 systems analyst ad in there, the only one that quotes a salary
8 for \$26,000.

9 CHAIRMAN BURG: I would imagine there are some
10 lawyers that are paid more or less than others, too, aren't
11 there?

12 MR. GREENMAN: There are, indeed, Madam Chairman.

13 CHAIRMAN BURG: It also applies to bureaucrats.

14 MR. GREENMAN: There is something of a going rate and
15 a range however, even in law but particularly in the computer
16 business.

17 BY MR. GREENMAN:

18 Q. Now, you said you have a reasonably sophisticated
19 system, data processing center. I assume that applies to the
20 analyst as well?

21 A. Yes.

22 Q. The first item here, the system design calls for
23 this analyst to spend full time designing the system for ten
24 months. Now, what is going to take him ten months to do? To
25 design a system?

12-6

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

A. I don't really think I am qualified to tell you. This is something that was prepared at my request. I can only assume that the individuals involved in coming up with the length of time involved in creating a system knew what they were talking about. That's why they're there.

Q. Would that apply to all the time estimates in here?

A. The time estimates have come from the experts in this particular field who are familiar, by the way, with my existing programs and the information that is stored there.

Q. But you don't know how they arrived at it?

A. I'm sure they made a judgment based on the existing volume of the information stored via the computer now.

Q. Ms. Cranston, as a reward, let me say if your answer to the question is no then I have to stop questioning you on this.

Do you know for a fact at how they arrived at this figure?

A. No.

Q. Going down the list, you have a program analyst at \$38.50 an hour and by my calculation that comes out to \$80,080 per year for that fellow or lady. Is that right?

A. I would agree with that, yes.

Q. The COBOL programmers, Item 3, at \$35.20 per hour, do you agree that that's an annual figure of \$73,000 and some?

A. Approximately.

12-7

1 Q Now, Item 4 is Key punch Operator as I understand it?

2 A No.

3 Q The people who punch in the data?

4 A This is the temporary staff that would be hired
5 within my own department area generally from temporary agencies.
6 They would be the people who would be reviewing the licenses,
7 affixing the timing to the licensing, reviewing them for con-
8 tractual language.

9 Because as the system is now, the fact that a rate
10 is established at 2 3/4 cents does not necessarily mean that
11 that's a statutory-linked license. The license itself would
12 have to be reviewed.

13 Q At any rate, you've got a figure here of \$9.90 per
14 hour and that by my calculation comes out to \$20,592.

15 A That's what the going rate for temporary agencies is,
16 \$9.90, in Los Angeles.

17 Q Are you going to hire people for seven months from
18 a temporary agency?

19 A Absolutely. I had to hire six people from a temporary
20 agency just to incorporate the change in the compulsory license
21 in 1976. We have to continue with our business on a day-to-day
22 basis. I just can't really pull all my staff off to do this.

23 Q We all know, I think, that it is more expensive to
24 hire through a temporary agency than to take somebody on full
25 time so if you've got an extended period of time -- you mean to

12-8

1 tell me you couldn't hire somebody directly or through an
2 agency, if necessary, but as your own employee for this period
3 of time?

4 A. That's a possibility, I'll grant you that.

5 CHAIRMAN BURG: Mr. Greenman, Commissioner Garcia is
6 taking exception to that statement.

7 MR. GREENMAN: Well, some of us have had that
8 experience.

9 BY MR. GREENMAN:

10 Q. And finally the last item for which a rate is stated,
11 well, before I leave that topic let me drop down here to Item
12 8 where you state a cost of \$16,500 for the two permanent
13 personnel that you are going to take on.

14 And finally, Item 5, at \$35.20 per hour -- I guess
15 we've already got that figure. It's over \$73,000 per year.

end 12

JW

1 BY MR. GREENMAN:

2 Q Let's turn to your Exhibit I, that's the chart
3 headed "New Warner Brothers First Album Releases". That was
4 the one you put in.

5 A Yes, I know.

6 Q Your counsel will give you another copy.

7 For my own clarification, am I correct that the
8 first figure there is the sum of the second and third figures?

9 A That's correct.

10 Q And the figure on the total line of 4,806,565, that's
11 the sum of the third item on the page, the million four hundred
12 some thousand, and the next item, the three million three hun-
13 dred some thousand; is that right?

14 A That's correct.

15 Q Now, the term "recording costs" and "advances", or
16 vice-versa, occurs at several points here. Looking at the
17 total figure, the 4,800,000 figure again, can you tell us how
18 much of that is recording costs and how much of it is advances
19 other than recording costs.

20 A Well, actually, they are all in my terminology a
21 recording cost. Let me explain to you perhaps a little about
22 how some of the contracts may or may not work.

23 Are you assuming recording costs actually to be only
24 that which is actual bills paid for studio time, musicians,
25 payroll, et cetera, is that what you mean by the term --

pw-13-2

1 Q That's what I mean by the term -- I do not, in
2 getting into this, waive the objection we had earlier, the
3 verbal description of contracts, but since you brought it up,
4 go ahead.

5 A The reason that this is so termed recording costs and
6 advances is that we don't necessarily pay all the bills for
7 the artist. They may have a budget for their album which they
8 pay their own costs on, which would be one-half of the amount
9 due on commencement of the recording and one-half due on
10 delivery of the actual product. That really forms an advance.
11 It's not allocable to actual talent costs and/or studio costs.
12 It is called an advance to the artist.

13 Q That's payable to the artist in some fashion.

14 A And he then pays his own bills with that.

15 Q Right. Now, that's part of the money I'd like -- I'd
16 like to segregate this if we can. Can we do that?

17 A I can't do that for you here, no.

18 Q Could you give us that figure?

19 A I would have to check with the west coast office.

20 Q Obviously, with relation to the same 58 albums, just
21 in one group, those that are recording costs --

22 A Actual bills paid by Warner Brothers versus checks
23 cut to the artist to pay his own costs?

24 Q Either way. Either recording costs paid directly
25 by Warner Brothers or reimbursement of straight recording costs

pw-13-3

1 to the artist or the producer, if that's done that way, but
2 just plain recording costs rather than other costs.

3 A. What do you term as "other costs"?

4 Q. Well, we've had testimony here by both CBS people
5 and by Mr. Cornyn, and by others, that it's quite common to give
6 advances to artists for their expenses of one kind or another,
7 over and above the recording costs. That's what I'm looking
8 for. Now, if there's a more convenient way of dividing them
9 up, I would accept any suggestion. But the description we've
10 had here has been in terms of the recording session cost, other
11 studio costs, other artist costs, and so forth, musician costs,
12 versus engineering costs, and so forth, versus amounts paid out
13 for other expenses.

14 A. But you would accept the fact that we pay the artist
15 X number of dollars for his session expense, which is probably
16 a part of this advance, as part of the recording cost? I want
17 to make sure I understand.

18 Q. If it's to reimburse him.

19 A. Yes.

20 Q. Not for his own costs, for his own efforts, or some
21 payment he has made out for the recording.

22 A. I may not always know what he has paid.

23 Q. To the extent that you can. I would appreciate a
24 division, a segregation of that kind, if you can.

25 COMMISSIONER COULTER: Excuse me. While you are

1 doing that, if you could also, perhaps, find out what portion
2 of the advances and recording costs were paid by the two
3 artists who received that 840.

4 THE WITNESS: Fine.

5 BY MR. GREENMAN:

6 Q Now, looking at these figures, you have a total, then,
7 of recording costs and advances of some 4,800,000, and that is
8 for 58 releases. Again, using our handy computers, I came up
9 with an average per release figure for the recording costs and
10 advances of \$82,872.

11 Q That's correct.

12 MR. GREENMAN: I ask other counsel if they would
13 check on it.

14 BY MR. GREENMAN:

15 Q Now, also, looking at this figure, at these figures,
16 and the total number of albums sold, which were put in the
17 record earlier, from you and Mr. Cornyn, that number of albums
18 sold, I have down at 2,211,000 -- I'm sorry, units sold would
19 be the right term. And dividing that number into the total
20 royalties credited of 2,297,784, I get an average royalty figure
21 of \$1.04 per unit sold; is that correct?

22 A I will not object to your math at this stage. It
23 sounds about reasonable.

24 Q And the contract, as I understand your earlier
25 testimony, provides that the artists are paid on units sold.

1 A. That's correct.

2 Q. Producers, as well?

3 A. Correct.

4 Q. You also testified to a division between artists and
5 producers with the, I think you said "typical" was the producer
6 getting 25 percent and the artist 75 percent of the royalties
7 credited; is that right?

8 A. Correct.

9 Q. Now, we had some earlier testimony on that subject.
10 Dr. Butler gave us some figures during his testimony at pages
11 145 to 146 of his testimony -- you wouldn't know that -- but,
12 his figure was that for relatively inexperienced artists and
13 producers, the producer would get three to four percent as a
14 producer royalty, and the artist seven to ten percent. And I
15 worked that division out to be roughly 40 - 60.

16 MS. PHILLIPPS: I would just like to note for the
17 record that Dr. Butler is in the jazz area, and he was testifying
18 specifically about the area in which he works. So, I think that
19 should be taken into consideration.

20 MR. GREENMAN: That's quite correct. That was
21 strictly with respect to jazz, and he said he was not familiar
22 with the others.

23 BY MR. GREENMAN:

24 Q. Now, we also, I believe, had testimony from Mr.
25 Yetnikoff, who is the president of CBS, and apparently most

1 interested in the popular field, that typical for unproved
2 artists was an arrangement of six percent for producer, twelve
3 percent for artists, making a total of 18 percent. That would
4 give a ratio of about 33 to 67.

5 Now, I put these two figures to you to ask you whether
6 your 25 - 75 figure is meant to be precise, or might it be
7 somewhat closer than 33 - 67 or or 40 - 60, figures that we've
8 had from CBS.

9 A. Well, your contracts obviously vary. This is put
10 together simply as an average.

11 Q. Coming back to this problem of the contracts again,
12 again, without waiver, how did you arrive at that figure? Is
13 this some recollection you have?

14 A. Well, actually, I didn't arrive at the figure. This
15 is information that was presented by somebody other than myself.
16 Originally, within this Tribunal, I was asked to actually pre-
17 pare this chart, based on figures that had already been done.
18 So, I really didn't calculate the rate.

19 Q. At any rate, by my calculation, then, if the producer's
20 royalty is 25 percent of the total artist and producer together,
21 and it's \$1.04 per unit sold, then on that basis, the producer
22 is getting 26 cents, or is credited with 26 cents per unit sold;
23 is that correct?

24 A. I guess so, yes.

25 MR. SHERMAN: Mr. Greenman, what I fear is happening

1 is that we are overlooking Ms. Cranston's testimony earlier
2 about the application of the unit royalty to the free goods.

3 MR. GREENMAN: Yes, we'll come to that in a minute.

4 MR. SHERMAN: But all your questions are based on
5 the dollar figure, and she had testified earlier that --

6 MR. GREENMAN: Well, I've been very careful to state
7 them in terms of units sold, because that's the way, as I
8 understand it, the contracts are written, in units sold; is
9 that right?

10 THE WITNESS: Yes.

11 MR. SHERMAN: I don't want to prolong this. It's
12 simply for purposes of comparison to CBS figures that they were
13 blowing it up to the units distributed, that is including the
14 free goods. Therefore, either you have to blow it up to
15 compare it or in order to compare what CBS figures are versus
16 a Warner Brothers figure, or you can look at each one separately.

17 MR. GREENMAN: We're off on a colloquy, but let's get
18 to the base of this. Whatever the base is on which CBS calcu-
19 lates it, the relative proportions of artist and producer would
20 not be affected by that; is that correct?

21 MR. SHERMAN: That's correct, true.

22 BY MR. GREENMAN:

23 Q As I understand it, a number of these producers are
24 employees or Warner Brothers, who are also on salary in addition
25 to the producer royalties they receive. Am I right about that?

1 A. Are you referring specifically to this chart now?

2 Q. Wasn't that your earlier testimony?

3 A. I said there would be producer royalties included
4 in this. I don't believe I ever specifically stated that our
5 in-house producers -- I said they could be, but the fact is I
6 don't know what producers are attached to these particular
7 albums.

8 Q. But some of the -- these are all of the albums for
9 a year.

10 A. No. They are all the first artist releases.

11 Q. New artists for a year, correct. Is that right?

12 A. First artist releases for a year, yes.

13 Q. All right. But all of that category for an entire
14 year.

15 A. Yes.

16 Q. And your testimony earlier, as I understood it, was
17 that some producer royalties are regular -- are regularly paid--

18 A. Regular?

19 Q. I'm sorry. Let me start over. As I understood your
20 earlier testimony, and correct me if I'm wrong, it was that
21 some producer royalties are paid to in-house producers; that is,
22 CBS employees -- I'm sorry, Warner Brothers employees who are
23 also on salary. Am I correct?

24 A. Yes.

25 Q. And also, you said that it was common in that situation

1 to pay those royalties from the first record without recoupment.

2 A. No, I don't believe I said it was common. I said that
3 the contracts, again, can vary.

4 Q. Well, all right. We can later refer back to the
5 record. But that is done in some cases; is that right?

6 A. That they are paid from the first record?

7 A. Yes.

8 A. In some instances, yes.

9 Q. I thought you had said that where it was an in-house
10 producer, that was common.

11 A. I may have used that word. I don't know.

12 MR. SHERMAN: I remember her saying it was not
13 infrequent.

14 THE WITNESS: Not infrequent, okay.

15 BY MR. GREENMAN:

16 Q. Now, let me go to your earlier testimony about your
17 request to publishers for reduced rates. You testified, as
18 I understand it, about four records where this issue had arisen,
19 I guess you said in the last six or seven months.

20 A. Correct.

21 Q. Now, in the first two cases, the Steve Martin and the
22 Richard Pryor records, as I understood it, the way this situation
23 arose is that you had not received a license in advance of
24 release from the publisher, and they contacted you after the
25 release.

1 A. That's correct.

2 Q. Claiming, I presume, an infringement?

3 A. Correct.

4 Q. So, there was no negotiation before release at all;
5 in fact, no negotiation prior --

6 Q. No, I was not aware of the fact that Steve Martin
7 had for four seconds sang the words, "Born to be Wild", nor
8 that Richard Pryor had hummed seven seconds of "Close Encounters
9 of a Third Kind".

10 Q. But there was no negotiation, was there, prior to
11 the publishers getting in touch with you, which was well after
12 the release?

13 A. No.

14 Q. Now, in the third example, that Stuart Margolin medley,
15 the request was made of the publishers two or three weeks before
16 release, as I understand it.

17 A. Correct.

18 Q. By that time, the recording had been made, and I
19 suppose the pressing had been done; is that right, the cover
20 had already been made, jackets obtained, and so forth?

21 A. I wouldn't know exactly precisely what the dates are.
22 I could check them out for you, if you are that interested.

23 Q. But, in the normal course, that would be the case,
24 wouldn't it?

25 A. Well, about that, yes.

pw-14-11

1 Q All that investment was done and committed?

2 A Yes.

3 Q We've had a figure here before of average recording
4 costs and advances, which is only part of that capital invest-
5 ment, of \$80,000; is that right? In the year '79, for these
6 new artists, you would have committed an average of over \$80,000
7 per release long before release date.

8 MS. PHILLIPPS: How did you arrive at that figure?

9 MR. GREENMAN: That's just recording costs and
10 advancements.

11 MS. PHILLIPPS: On RIAA Exhibit I?

12 MR. GREENMAN: Correct.

13 BY MR. GREENMAN:

14 Q The last record -- I didn't get the name of that
15 last release. It was going a little fast at that point. What
16 was that?

17 A I think it's just called the Antonio Carlos Jobim
18 album. No, I'm sorry, Terra Brasilas.

19 Q I guess it will be easier if we just call it the
20 Jobim album.

21 That one, as I understand, you requested the reduced
22 rate in March of this year, and the release date was sometime
23 in April.

24 A Yes, I believe so.

25 Q So, that's about a month leave there.

pw-13-12

1 A. Yes.

2 Q. And in that case, also, most of the capital invest-
3 ment in that release would have been committed by that time.

4 A. That's correct.

5 Q. Now, have you bought a house, ever?

6 A. Recently?

7 Q. Not recently.

8 A. Yes, I own three of them.

9 Q. Let's suppose you bought one and you had to put in
10 \$80,000 worth of renovation costs. Do you think it wise to
11 negotiate the price after you had taken possession and done
12 that renovation cost?

13 A. Yes.

14 Q. You think your bargaining position would be particu-
15 larly good at that point?

16 A. No.

17 Q. We have a somewhat similar situation, perhaps, in
18 book publishing. Do you think it would be wise of a book
19 publisher -- say, the publisher had a book on which the paper,
20 printing, and binding costs were \$80,000. And they not only
21 made an arrangement with the author, but they printed up the
22 book, bound it, and were set to release it, would it be wise
23 of them in that case to then sit down and try and negotiate a
24 royalty with the author?

25 A. No. I wouldn't think so.

1 CHAIRMAN BURG: Let me ask a question. On those
2 two, the Steve Martin and Richard Pryor album, are those
3 basically music or humor?

4 THE WITNESS: These are comedy albums.

5 CHAIRMAN BURG: Comedy albums.

6 THE WITNESS: There's normally not any music on them,
7 which is why I really wasn't aware that there was seven seconds
8 of humming, or whatever, involved.

9 BY MR. GREENMAN:

10 Q. On that subject, don't you have somebody who goes
11 over your records to see if there is any music in them?

12 A. Well, maybe you should listen to it. I'm not sure
13 it's music.

14 COMMISSIONER JAMES: Could we have that played?

15 MR. GREENMAN: I presume you'll make that argument
16 to the publisher.

17 MS. PHILLIPPS: I don't believe we could play the
18 Richard Pryor album.

19 COMMISSIONER JAMES: That's why I asked.

20 BY MR. GREENMAN:

21 Q. In this business, do you customarily record, make
22 a recording and put \$80,000 into the recording cost, and then
23 set out and negotiate the artist royalties?

24 A. No, the artist royalty is negotiated at the time that
25 the artist is signed to the company, prior to any release of

1 product, and the commitment of product is generally a portion
2 of the negotiation.

3 Q That is the reasonable way to do it, is it not?

4 A That's correct.

5 MS. PHILLIPPS: If I may just interject for a moment.
6 I think Mr. Greenman is creating a misimpression, because Ms.
7 Cranston earlier testified as to the reason why she did not --

8 MR. GREENMAN: Ms. Phillipps, I know her earlier
9 testimony, and I think the Tribunal knows it quite well.

10 MS. PHILLIPPS: -- apply for licenses until shortly
11 before release, and that is because the publishers want a catalog
12 number, and that is not assigned until shortly before release.

13 THE WITNESS: They specify right on the license that
14 that license is only good for that release.

15 MR. GREENMAN: We will come to that in due time, but
16 I think we all know what the testimony was earlier this morning.

17 BY MR. GREENMAN:

18 Q Without belaboring the point, obviously, at the time
19 you committed all that investment, you had very limited bar-
20 gaining power, is that not obvious, in negotiating? Once you
21 put the capital into the record, if you then go to negotiate
22 the right to release the record, you have a very limited
23 negotiating power, don't you?

24 A Yes. There is a limited negotiating power.

25 Q In fact, in the case of the Martin and Pryor records,

pw-14-15

1 your posture legally is, is it not, the publishers could force
2 you to withdraw those records, they being infringements?

3 A. Yes, I am sure they could. They seem to be more
4 interested in receiving statutory rate at the moment.

5 Q. Perhaps you should say without waiving anything at
6 that point.

7 (Laughter)

8 Now, you said that the publishers asked that you not
9 file for a license in the regular course until you had assigned
10 a catalog number; is that right?

11 A. I'm sorry. I didn't hear the beginning of that.

12 Q. Referring back now to what Ms. Phillipps said, the
13 publishers -- let's back up.

14 Your bargaining power would be considerably better
15 and your bargaining position would be better, would it not, if
16 in fact before you committed any capital, any investment in the
17 release, you did you negotiating with the publisher just as
18 you do with the artist; isn't that true?

19 A. If it's before any capital at all is invested, I
20 wouldn't even know what to request a license on.

21 Q. Well, supposing a decision were made that Warner
22 would like to put out a record containing these tunes, or
23 possibly more than -- a larger number than the final number.
24 And you then went to the publishers before any capital were put
25 into that release. Would your bargaining position not be

1 better in dealing with the publisher?

2 A. I'm sure the bargaining position would be much
3 enhanced. But the fact is that I don't know. That is not the
4 way business operates.

5 Q. Well, that's not the way Warner Brothers presently
6 operates under the present mechanical royalties, right?
7 That's what you are saying?

8 A. I'm saying that -- I'm saying that I wouldn't know
9 what the tune structure was that the artist intended to release.

10 Q. He could tell you, could he not?

11 A. Sometimes they really don't know what they are going
12 to utilize until they are right in the studio.

13 Q. Hopefully, they know a little before that time. They
14 could let you know when they do know or they could let you know
15 all the songs they are thinking of using, could they not?

16 A. I suppose the artist could do it. The fact that the
17 artist does not do it, and I think I would find it very diffi-
18 cult to have any given artist supply me with a list of tunes
19 that he intends to record prior to his going into the studio.
20 It just isn't practical from that standpoint.

21 Q. You said it isn't practical. It isn't done at the
22 present time, right?

23 A. That's correct.

24 Q. It isn't worth your while to do it at the present
25 time; isn't that the fact?

pw-14-17

1 A. I don't know that it's not worth my while. I think
2 that the fact that I don't get a license anyway until I -- the
3 publisher won't sign a license until I can give him exactly
4 what the release is.

5 Q. That's in the ordinary course at the present time.

6 A. That's correct.

7 Q. Now, have you ever gone to the publisher prior to the
8 making of the record, the recording sessions, assign the record
9 a catalog number or whatever number it's going to have, and ask
10 for the -- to negotiate the license?

11 A. I may never even release the product that is recorded.
12 It is conceivable that you can record product and not release
13 it, because commercially, it's not a good release, and it can
14 sit in the can.

15 COMMISSIONER JAMES: But you don't pay any royalties
16 on it, either, do you?

17 THE WITNESS: I don't request any licenses for
18 mechanicals on that, no. I don't pay any artist royalties, no.
19 I just pay for the cost of the production of the master.

20 COMMISSIONER JAMES: Well, as I understood his
21 question, correct me if I'm wrong, counselor, that before, even
22 if you didn't release it, you could get it even if you didn't
23 pay royalties on it.

24 THE WITNESS: I could get the license?

25 MR. GREENMAN: That's right.

 THE WITNESS: And they would sign the license? Because

pw-14-18

1 I would have had to have assigned a catalog number.

2 MR. GREENMAN: Yes.

3 THE WITNESS: And how would I know at that point
4 in time what catalog number to even assign it, since I don't
5 really know at that particular time what type of music it is
6 and what I think it's going to merit, as far as a price struc-
7 ture is concerned. That happens to be a part of my assigning
8 of catalog numbers.

9 BY MR. GREENMAN:

10 Q. Those decisions could be made, could they not? You
11 could go to the publisher at that point and make the decision,
12 and if it were important, get a reduction in rate, for instance,
13 at that point? That's when you would go for it, isn't it?

14 A. Yes.

15 Q. If it were a significant item of cost, so that you
16 had to incur some little other inconvenience and change the
17 regular routine, it could be done, could it not?

18 A. You would have to restructure the entire set-up of
19 Warner Brothers in order to effect that type of request, so that
20 you could know before they went into the studio exactly what
21 they were going to record. I really don't think that's a
22 practical approach with respect to creative people and artists
23 and producers and studios to get them to assume that they are
24 going to tell you, oh, yes, I'm going in and try out this tune
25 because you really should get a mechanical license on it. It

1 just doesn't work in this business today.

2 COMMISSIONER JAMES: Excuse me. Could I interrupt
3 again, because I'm getting a little confused.

4 MR. GREENMAN: Could I ask one thing that might
5 clarify this first?

6 COMMISSIONER JAMES: Okay.

7 BY MR. GREENMAN:

8 Q I'm not suggesting this as the routine matter, but
9 what you said to us is that in the last six months, there have
10 been four records which raised this issue, two of them you
11 couldn't have done because you didn't even take -- as I under-
12 stand, nobody took the steps to find out that the problem was
13 there. So, until you got somebody listening to the records or
14 sitting in on it thinking about music licenses with respect to
15 the Martin and Pryor albums, nobody would have initiated the
16 negotiations.

17 A That's right.

18 Q With the other two, it leaves two records out of
19 six months. Is there anything except inconvenience that would
20 prevent deviating from the regular routine to obtain a reduced
21 rate on those two releases by negotiating earlier with those
22 publishers? Apparently, they are the only two where the
23 problem has arisen.

24 A They are the only two that I've requested the reduced
25 rates on within that period of time, yes. I don't really think
I follow what you are trying to say here. Would you restate

1 that for me.

2 Q What I'm saying is that you said you would have to
3 change the whole procedure for getting licenses at Warner
4 Brothers. And what I'm saying is that this issue seems to
5 have arisen and required some change in procedure with respect
6 to two albums in six months. So, that's where the change would
7 be necessary to negotiate.

8 A And how would I have gotten the information from a
9 producer unless I had instituted changes in a massive order to
10 have this come in on a routine basis. I don't understand why
11 you -- how you are applying this now, piece meal, just to these
12 two.

13 Q This is a significant item of cost. If this is a
14 real problem, it wouldn't be hard to put out an announcement to
15 producers that if they are going to get into a situation where
16 you need a reduced mechanical, they should come to you before
17 they cut the record and not after. It requires issuing a
18 bulletin to all your people.

19 COMMISSIONER JAMES: Mr. Greenman, May I interrupt.
20 I'm trying to remember what company he was with -- either Warner
21 or CBS -- George Butler, I think his name was.

22 MR. GREENMAN: CBS.

23 COMMISSIONER JAMES: I guess it wouldn't apply. Well,
24 maybe it does apply to your examination.

25 He had a chart on the board where he talked about the

1 concept. Then, he talked about getting the material with the
2 artist. And this is long before it flowed down, as I recall
3 that chart. My question is destroyed. I thought it was with
4 her company. But as I recalled, there was an opportunity way
5 in advance before they went into that studio, that the pieces
6 were selected.

7 MS. PHILLIPPS: I think Dr. Butler also testified
8 about the mixing and re-mixing process and the ending and
9 sweetened process. At those stages, he also talked about having
10 to go back into the recording studio. And I would imagine at
11 that point -- I mean it's quite possible that --

12 COMMISSIONER JAMES: Counselor, I appreciate your
13 point, but it's not what I was addressing myself to. I'm
14 trying to follow the testimony here. There comes a point in
15 time before the record -- they go into the studio, where there's
16 at least a preliminary selection of the tunes that are going to
17 be played on that album. The sweetening and all that other
18 stuff -- and I will have the record checked by the time I come
19 in tomorrow to argue with you on the point -- it doesn't deal
20 with the question I'm answering. That's after the record is
21 cut and they are trying to straighten it out.

22 I thought Mr. Greenman's questions dealt with is
23 there a point in time where there's somebody at a record company
24 that knows what tunes are going to be put on an album before
25 they go in the studio so that a license could be negotiated

1 prior to that time. Now, if I've interpreted his question or
2 his line of questioning wrong, then let him correct me on it.

3 MS. PHILLIPPS: Can I make one point. If you go
4 into the recording studio and it's -- under the statute, I
5 mean, there is a provision for playing time rate. I mean, you
6 certainly wouldn't know the playing time rate until after you
7 had gone through the whole recording --

8 COMMISSIONER JAMES: You're talking about the old
9 system.

10 MS. PHILLIPPS: Well, I'm talking about the old
11 system and the new system. There's a provision for playing
12 time --

13 COMMISSIONER JAMES: What difference would it make?

14 MS. PHILLIPPS: Well, it makes a difference as to
15 what the rate would be. How can you negotiate from a rate if
16 you don't know what it is. And the statute -- incorporated
17 in the statutory rate at this time is a playing time rate. So,
18 this can still be statutory but yet based on playing time.

19 COMMISSIONER JAMES: The statutory rate right now
20 is 2.75, right?

21 MR. SHERMAN: Correct.

22 COMMISSIONER JAMES: It's 2.75.

23 MS. PHILLIPPS: Right.

24 COMMISSIONER JAMES: And we have seen some contracts
25 that say 50 percent of statutory rate. Right? They go to

1 1:15, they could compute the time, right? So, it really
2 doesn't make any difference.

3 MR. SHERMAN: No. The point is in order for a
4 publisher to know in negotiation what his rate is going to
5 be, he has to know what his cents are going to be. He wants
6 it converted to cents, at least you presume that he wants to
7 know what the cents are going to be. And he can't know the
8 cents until you know the total mix of songs on the album, the
9 number of tunes, the playing time of each tune. You put it
10 all together and then you figure out 10.4 units divided into
11 whatever retail list price they decide on.

12 COMMISSIONER JAMES: I'm dealing with the current
13 system right now.

14 MR. SHERMAN: Oh, the current system.

15 COMMISSIONER JAMES: Yes.

16 MR. SHERMAN: I see.

17 COMMISSIONER JAMES: Mr. Greenman, answer my question.
18 Maybe I don't understand what he is going at.

19 MR. GREENMAN: All right. I'm going at a couple of
20 things. Number one, in this particular situation, I am talking
21 about the fact that I'm really -- I was in the last few
22 questions directing myself at Ms. Cranston's remarks that it
23 would require a wholesale revision of the system at Warner. And
24 I'm trying to show that indeed it wouldn't have required any
25 such drastic change to cope with these two instances, which are

1 the only two times that it has arisen. Because they didn't make
2 this minor change to go seek the licenses before they cut the
3 record instead of after, they got themselves into this box
4 where they, of course, were in an impossible bargaining position.

5 COMMISSIONER JAMES: I understood that. But go on,
6 then.

7 MR. GREENMAN: And all of this, of course, is
8 directed at the question of whether negotiations are possible
9 as a general matter or would be possible under any system.
10 That's the whole thrust of all this testimony that we have had
11 from the record companies concerning past performances. If
12 I may state the argument so that the point is clear, what I am
13 saying is that there has never been any serious effort to
14 conduct negotiations that anybody who is seriously interested
15 in conducting negotiations doesn't sink \$80,000 or more into
16 an operation before they go find out the amount they are going
17 to have to pay to one of their suppliers. If the supplier's
18 cost is significant, you do that first, when you have a
19 bargaining position.

20 MS. PHILLIPPS: What industry are you referring to?

21 MR. GREENMAN: Any industry.

22 MS. PHILLIPPS: Well, that's not how the record
23 industry is.

24 MR. GREENMAN: Well, I would suggest that the reason
25 it hasn't been done is because it hasn't been a significant

pw-14-25

1 problem and nobody has had any reason to make a significant
2 effort.

3 MR. SHERMAN: If Commissioner James is going to
4 be checking transcripts tonight --

5 COMMISSIONER JAMES: Can you give me a page. I don't
6 remember --

7 MR. SHERMAN: It was Butler. But you know who else
8 testified to this was Walter Yetnikoff, who talked about the
9 feasibility of negotiating when you are in the creative process.
10 I would like to give you a Yetnikoff citation, too, where he
11 addressed this very point, and a Berman citation, where we
12 made exactly this point to Mr. Berman on cross examination, that
13 the record company is not in a very good bargaining position if
14 it's trying to get a reduced rate after the recording has been
15 made or released. And he said, "No problem at all. We are
16 reasonable people. We have to work with these people."

17 COMMISSIONER JAMES: I recall that. But maybe you
18 can save me some homework tonight. It was Butler that indi-
19 cated -- he had a chart, and he gets the artist and they talk
20 about the material and things, and then they decide what they
21 are going to put on that record. Now, I'm a little confused
22 by your co-counsel's thing about the time. I am talking about
23 right now, not in the future.

24 MS. PHILLIPPS: There is a playing time rate in the
25 current statute.

pw-14-27

1 or however many responses there were to that particular question.
2 And he said that this would expedite Mr. Kiser's appearance
3 on the stand, and Mr. Zuckerman chimed in and said, "For the
4 record, the reports prepared by CRI which were submitted to
5 Congress contain such a line by line aggregation."

6 I would like to hand to the Tribunal and to Messrs.
7 Greenman and Zuckerman, the line by line aggregation of data
8 which in some regards has been adjusted from the earlier data
9 that was contained in Exhibit 1.

10 In addition, we have gone through the questionnaire
11 line by line to give you a report in response to Mr. Greenman's
12 proposal.

13 Before the rains come, I will say one final word as
14 I'm walking toward the podium. We urge the Tribunal to keep
15 next Friday available for the conclusion of Mr. Kiser's statement.
16 We have -- we believe that testimony can be -- and cross
17 examination can be conducted in a way that the Tribunal's
18 questions might come at the end to permit Mr. Greenman and
19 Mr. Abram to do their cross examination initially, so that we
20 can conclude Mr. Kiser next week, and we hope to meet our
21 goal of concluding our case the following week. I don't want
22 to do anything more than make that a request at this time.
23 And we will revisit it, I suppose, on Tuesday morning.

24 Thank you very much.

25 CHAIRMAN BURG: All right. Because we have another

1 meeting scheduled for early in the morning, we won't reconvene
2 here until about 11:15 tomorrow morning.

3 MR. ZUCKERMAN: Madam Chairman, if Ms. Cranston is
4 going to be staying on the east coast, and I was going back
5 to New York tonight --

6 CHAIRMAN BURG: We have meetings Friday and Monday
7 of this week, so we're in a bind right now, and we're trying
8 to work it out that way.

9 MR. ZUCKERMAN: If it would be possible for her to
10 come back after Dr. Kiser, or else to be here on Tuesday.
11 I wish that we had started her yesterday afternoon. I don't
12 understand why we didn't.

13 CHAIRMAN BURG: Well, we didn't.

14 MR. FITZPATRICK: Mr. Simone had to attend a funeral,
15 you might recall.

16 MR. ZUCKERMAN: We concluded earlier yesterday.

17 MS. PHILLIPPS: How were we to know that you
18 concluded early?

19 CHAIRMAN BURG: 11:15 tomorrow morning.

20 (Whereupon, the proceedings were adjourned at 4:30
21 p.m., to reconvene the following day, July 18, 1980,
22 at 11:15 a.m.)
23
24
25